(2) Supreme Court, U.S.
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No. _____

APPENDIX

IN THE SUPREME COURT OF THE UNITED STATES

JOHN ARDELL PURSLEY, *Petitioner*

v.

P. CALVIN ROBERTS, RUTH LAUBMIER, ROSALIE REGINA WILSON, ANNA ELEANOR LONG, DONALD MILTON KELIUS, FRANKLIN DAVID KELIUS AND RAY KELIUS, *Respondents*

CONSTANCE KEHOE, EXECUTRIX FOR THE ESTATE OF DOROTHY F. MESSERLY, *Respondent*

GEORGE W. PEDLOW III, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

John Ardell Pursley, *Pro Se, Petitioner*
30 Hemlock Dr.
Lock Haven, PA 17745

570-748-8199

October 27, 2000

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APPENDIX

IN THE COURT OF COMMON PLEAS OF CLINTON COUNTY, PENNSYLVANIA
CIVIL ACTION - LAW

P. CALVIN ROBERTS, RUTH LAUBMIER, ROSALIE REGINA WILSON, ANN ELEANOR LONG, DONALD MILTON KELIUS, FRANKLIN DAVID KELIUS, and RAY KELIUS

vs.

Estate of RUTH PURSLEY, MELLON BANK CENTRAL, N.A., Executor, DOROTHY P. MESSERLY, FORNEY D. WINNER and MARY E. WINNER

Non-Jury Trial-October 2, 1995
NO. 439 - 92

FILED
CLINTON COUNTY, PA

Oct. 5 4:11 PM '95

BARBARA L. EMERY
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Appearances: Charles R. Rosamilia, Jr., Esquire, for Plaintiffs
John A. Pursley, Pro Se
George W. Pedlow, III, Pro Se
Matthew Patch, Esquire, Williamsport, PA, for Forney D. and Mary E. Winner

DISCUSSION AND ORDER

Plaintiffs began this litigation by filing an Action to Quiet Title on March 26, 1992. (n1)

- -footnote- - - - - - - - - - - - - - - - - - -
(n1) A prior action to No. 115 April Term, 1970, involving the same parcel and the same parties or their predecessors, was voluntarily discontinued in 1976. Defendant Pursley's motion to dismiss on res judicata grounds is, therefore, denied.
- -end footnote- - - - - - - - - - - - - - - -

At the time the action was brought, Mellon Bank Central, N.A., was acting as executor of the Estate of Ruth Pursley. By Order of President Judge Brown, Mellon Bank was "relieved from any responsibility or authority to act further in defense of the estate of Ruth Pursley, deceased, with regard to the Quiet Title action filed to Clinton Action 432-1992." John Ardell [2] Pursley and George W. Pedlow, III, two of the heirs of the Ruth Pursley Estate have acted on behalf of the estate throughout this litigation. (n2)

- -footnote- - - - - - - - - - - - - - - - - - -
(n2) John Ardell Pursley has acted both pro se and with counsel on behalf of the Ruth Pursley heirs in connection with multiple extensive litigation arising out of the administration of the estate. All Pursley heirs have acquiesced in such representation.
- -end footnote- - - - - - - - - - - - - - - -

On May 27, 1992, Constance Messerly Kehoe filed an Answer on behalf of the Dorothy P. Messerly heirs, being herself and Anne Messerly Cooper Chen. No one has appeared since on behalf of the Messerly heirs.

At the beginning of the trial this date, the parties entered into a Stipulation that Forney D. Winner and Mary E. Winner were the sole legal and equitable owners of Tract P/3, 45 acres, Thomas Willing Warrant No. 3495, shown on

the various documents including Plaintiffs' Exhibit 5 outlined in red. Any Final Decree will reflect that Stipulation.

While the parties attempted to reach an agreement prior to trial concerning the admissibility of documents, the trial itself was complicated by the inability of Pursley and Pedlow to comprehend or follow legal procedures. With the exception of the admission of certain documents (Defendants' Exhibit 1 by agreement and Defendants' Exhibits 2 through 5 inclusive over Plaintiffs' objection), the defense consisted entirely of rambling and repetitious statements by Pursley interspersed by comments from Pedlow and two other Pursley heirs. In response to a question from the Court, Pursley acknowledged he was financially able to hire counsel. Indeed, the Court's experience with Pursley satisfies the Court there would have been no financial impediment to the securing of counsel. [3]

Defendants failure to properly establish a defense to Plaintiffs' claim is solely their responsibility.

The parcels in dispute are identified in Plaintiffs' Exhibit 1 (acknowledged by Defendants), being a Pennsylvania Department of Forest and Waters lot division blueprint dated August 18, 1932. As mentioned by Pedlow and as can be determined from other evidence, the 1932 blueprint was redrawn from a document generated in the 1800's. The parcels which concern the Court are a 233.8-acre parcel in the names of Robert and James W Devling and a 96-acre parcel in the name of James Moore.

While Plaintiffs' abstract of title allegedly goes back to December 21, 1796, the best evidence of Plaintiffs' title is a Deed from Bryon D. Hamlin, et al., to Henry E. Shade, dated January 3, 1901, and recorded in Clinton County in Deed Book 64, Page 744. An examination of that Deed satisfies the Court that it was prepared by the scrivener by reference to the then existing Department of Forest and Waters drawing, redrawn in 1932. The directions, distances, and total acreage clearly identify the Devling and Moore parcels. Plaintiffs' title traces forward from the 1901 Deed using the same description but excepting therefrom a conveyance from Henry R. Shade to J. A. Shade in 1915 referenced

in Clinton County Deed Book 89, Page 492.

Defendants suggest records of tax receipts in the late 1800's indicate that Hamlin did not retain ownership of sufficient acreage by 1901 to have had title to the 330-acre parcel claimed by Plaintiffs. Those records were not introduced into evidence and this Court is unable to do Defendants' research for them. Nor does the Court intend to examine or research [4]any documents other than those specifically introduced as Defendants' Exhibits 1 through 5 inclusive.

Defendants have referred the Court to two Sheriff's Deeds, one dated March 27, 1860, and the other dated February 17, 1868, for the proposition that those Deeds "define the location" of the subject properties. Based on a review of those Deeds, the Court believes Defendants' assumptions are a leap of faith which cannot be justified by the evidence.

Defendants further refer the Court to a Treasurer's sale blotter listing a tax sale on July 8, 1896, at which D. C. Pursley and others allegedly purchased a 300-acre parcel in Thomas Willing Warrant 3476. Defendants contend this purchase was of the two subject parcels. Unfortunately, Defendants did not receive a Treasurer's Deed for any parcel in Thomas Willing Warrant 3476 until 1924 following the sale that year.

In examining the Treasurer's Office documents set forth in Defendants' Exhibits, it would appear that David C. Pursley was assessed for parcels in Warrant 3476 containing 233.8 acres belonging to Robert and J. W. Devling and 96 acres belonging to James Moore. Those Treasurer's Office documents indicate such assessments as early as 1912. Indeed, Defendants' "Trial Brief for Quiet Title Action" suggests that Ray Pursley acquired certain unseated lands in Thomas Willing Warrant 3476 on June 10, 1912, and that D. C. Pursley acquired the same or similar parcels at Treasurer's sale on June 10, 1918, and June 12, 1922. Not until the Treasurer's sale of 1924, however, was a Deed prepared conveying ownership to David Pursley. Interestingly, those two Deeds (Defendants' Exhibits 1-5) suggest that David Pursley was the owner of the property which had been

sold by the Treasurer. As acknowledged by Pursley, and as initially noted by this Court, documents relating to the [5] ownership of unseated land in rural sections of Clinton County are historically and notoriously inaccurate and were often a sham for the purpose of acquiring ownership solely through manipulation of tax sale proceedings. Moreover, no evidence has been presented by Defendants to rebut the presumption that such lands were redeemed by the owners. The lack of a Deed for any sale prior to 1924 suggests that redemption was made each year.

This Court is simply not satisfied that the predecessors or antecedents of any of the Defendants acquired any legitimate title to the subject premises until the delivery of the Treasurer's Deed on June 9, 1924, at the earliest. Defendants failed to introduce any evidence which would suggest that Plaintiffs' predecessors in interest failed to pay the taxes assessed against these parcels, were notified of any Treasurer's sale, or forfeited in any way their interest in the subject parcels.

Equally important, Defendants, purely through neglect, failed to record the 1924 Treasurer's Deeds until February 23, 1967, three years after the Kelius family (the present Plaintiffs) first acquired the subject parcels. Clearly, therefore, as between Plaintiffs and Defendants, Plaintiffs' recorded title is prior in time. That situation, coupled with the court's finding that Defendants have failed to prove any written title prior to 1924 while Plaintiffs' recorded title clearly traces back to 1901, requires the Court to rule preliminarily in Plaintiffs' favor.

While Plaintiffs have proceeded only on the basis of the strength of their own title and not on adverse possession, the Court notes that an arguable claim might have been made based on adverse possession. While it is acknowledged that the parcels in question are unenclosed woodland, pasture land, scrub land, or marsh land, the testimony establishes, and [6] the Court makes a specific finding, that Plaintiffs engaged in the following activities continuously, openly, notoriously, and hostilely since 1964:

a. Posting the perimeter of the premises;

b. Engaging in hunting and recreational activities on the premises;

c. Timbering the premises;

d. Leasing the premises to oil and gas exploration companies;

e. Constructing a road through the premises to another parcel owned by them to the south.

f. Paying taxes on the premises.

While appellate decisions have suggested such activities in themselves might have been insufficient to establish title by adverse possession, the combination of such activities in this case, together with the fact that Plaintiffs own the parcels immediately to the north and to the south of the subject parcels, may well be sufficient to establish title. While the record reflects that both Plaintiffs and Defendants have been paying taxes on these parcels, Defendants have infrequently been in the vicinity of the premises, and the Court is unable to make a finding that any of Defendants or their representatives have ever set foot upon the parcels m question, much less exercised any dominion over them.

NOW, October 2, 1995, based upon the Findings of Fact and Conclusions of Law as set forth in the preceding narrative, and after considering the arguments of the parties and the various exhibits presented, IT IS ORDERED, ADJUDGED, AND DECREED as follows:

1. Plaintiffs have established prima facie evidence that they are the owners in fee simple and are entitled to the quiet and peaceful possession of that real property situate in [7] Keating Township, Clinton County, Pennsylvania, as set forth in Paragraph 4 of their Complaint and being the Robert and James Devling parcel containing 233.8 acres and the James Moore parcel containing 96 acres in Thomas Will

ing Warrants 3476 and 3495 in said Township, excepting and reserving therefrom the following two (2) parcels:

a. That certain piece, parcel, and tract of land conveyed in September, 1915, in Clinton County Deed Book 89, Page 492, and

b. That portion of said parcels acquired by Forney D. Winner and Mary E. Winner, his wife, through a prior Action to Quiet Title filed in Clinton County to No. 46 January Term, 1968, and being Tract P/3, 45 acres, Thomas Willing Warrant No. 3495.

2. Defendants shall be forever barred from asserting any right, lien, title, or interest in said premises inconsistent with the interest or claim of Plaintiffs unless they shall commence an action in ejectment against Plaintiffs before 5:00 p.m. on November 5, 1995; said action shall be filed to No. 432-92, not to a separate number.

BY THE COURT:
/s/ J. Michael Williamson, J.

xc: Charles R. Rosamilia, Jr., Esquire
John A. Pursley, Pro Se
George W. Pedlow, III, Pro Se
Paul Reeder, Esquire (Matthew Patch)
Constance Kehoe, Pro Se, 19 Jaffray Park, Irvington, NY 10533
Stuart Hall, Law Clerk
Judge Williamson - file copy

IN THE COURT OF COMMON PLEAS OF CLINTON COUNTY, PENNSYLVANIA
CIVIL ACTION - LAW

P. CALVIN ROBERTS, RUTH LAUBMIER ROSALE REGINA WILSON, ANN ELEANOR LONG, DONALD MILTON KELIUS, FRANXLW DAVID KELIUS, and RAY KELIUS, Plaintiffs

v.

ESTATE OF RUTH PURSLEY, MELLON BANK CENTRAL, N A., Executor, DOROTHY P. MESSERLY, FORNEY D. WINNER and MARY E. WINNER, Defendants

NO. 432 - 92

ACTION TO QUIET TITLE
ACTION IN EJECTMENT

FILED
CLINTON COUNTY. PA

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FINAL DECREE

This matter originally began as an Action to Quiet Title. Following a bench trial, this Court entered a Decree on October 2, 1995, finding Plaintiffs established prima facie evidence that they were the owners in fee simple and entitled to the quiet and peaceful possession of the real property in dispute. Defendants were barred from asserting any right, lien, title, or interest inconsistent with the claim of Plaintiffs unless they commenced an Action in Ejectment.

After some delay, Defendants, all of whom are essentially represented by John Ardell Pursley, pro se, filed an

"Amendment to Defendants' Complaint and Action for Ejectment" on March 29, 1996. That pleading, in addition to being inconsistent with the pleading Rules, fails to set forth any new allegations not previously considered by this Court.

Plaintiffs filed a Motion for Summary Judgment and for Judgment on the Pleadings contending Defendants are barred from re-litigating the issues previously raised in the Quiet Title Action and are bound under the Doctrine of Collateral Estoppel by the Court' s prior rulings. Defendants have filed an affidavit containing numerous documents allegedly substantiating their position.

Defendants have raised no new issues or allegations which would cause the Court to reach findings of fact and conclusions of law inconsistent with those which formed the basis for the Decree of October 2, 1995. Based upon the reasoning set forth in that Decree, the Court hereby enters the following Final Order this 22nd day of July, 1996:

1. Defendants' Amended Complaint in Ejectment is dismissed with prejudice.

2. Defendants are forever barred from asserting any right, lien, title, or interest in those premises set forth in Keating Township, Clinton County, Pennsylvania, particularly described in Paragraph 4 of Plaintiffs' original Quiet Title Complaint, being the Robert and James Devling parcel containing 233.8 acres and the James Moore parcel containing 96 acres in Thomas Willing Warrants 3476 and 3495, excepting and reserving therefrom the following two (2) parcels:

a That certain piece, parcel, and tract of land conveyed in September, 1915, in Clinton County Deed Book 89, Page 492, and

b. That portion of said parcels acquired by Forney D. Winner and Mary E. Winner his wife, through a prior Action to Quiet Title filed in Clinton County to No. 46 January Term, 1968, and being Tract P/3, 45 acres, Thomas Willing Warrant No. 3495.

BY THE COURT:
/s/ J. Michael Williamson, J.

xc: Charles R Rosamllia, Jr., Esquire
John A. Pursley, Pro Se
Estate of Ruth Pursley
Mellon Bank (Central), N.A., Executor
Dorothy P. Messerly, Defendant
Forney D. Winner and Mary E. Winner, Defendants
George W. Pedlow, III, Pro Se
Matthew Patch, Esquire
Constance Kehoe, Pro Se, 19 Jaffray Park, Irvington, NY 10533
Court Administrator

P CALVIN ROBERTS, RUTH LAUBMIER ROSALIE REGINA WILSON, ANN ELEANOR LONG, DONALD MILTON KELIUS, FRANKLIN DAVID KELIUS AND RAY KELIUS

v.

ESTATE OF RUTH E PURSLEY, MELLON BANK CENTRAL, N.A., EXECUTOR DOROTHY P. MESSERLY, FORNEY D. WINNER AND MARY E WINNER

APPEAL OF: JOHN A PURSLEY

NO. 625 HARRISBURG 1996

SUPERIOR COURT OF PENNSYLVANIA

700 A.2d 475; 1997 Pa. Super. LEXIS 2642

April 17, 1997, Argued; August 13, 1997, Filed

SUBSEQUENT HISTORY: [**1]

As Amended.

PRIOR HISTORY: Appeal from the DECREE July 23, 1996, In the Court of Common Pleas, Civil Division. Clinton County, No. 432-92. Before WILLIAMSON, J.

DISPOSITION: Reversed and remanded.

COUNSEL: Scott T. Williams, Williamsport, for appellant. Charles R. Rosamilia, Jr., Lock Haven, for appellees.

JUDGES: BEFORE: CAVANAUGH, POPOVICH and OLSZEWSKI, JJ. OPINION BY CAVANAUGH, J.

OPINIONBY: CAVANAUGH

OPINION: [*476] OPINION BY CAVANAUGH, J.:

Filed August 13, 1997

Appellants, Estate of Ruth E. Pursley and Dorothy P. Messerly, appeal the Final Decree entered by the Court of Common Pleas [*477] of Clinton County. n1 For the reasons discussed below, we reverse.

- -Footnote- - - - - - - - - - - - - - - - -
n1 At the time this action was initiated, defendant Mellon Bank Central, N.A., was acting as an executor of the Estate of Ruth Pursley. By Order of the Honorable Carson V. Brown dated September 11, 1992, Mellon Bank was "relieved of any responsibility or authority to act further in defense of the estate of Ruth Pursley, deceased, with regard to [this action]." Additionally, defendants Forney D. Winner and Mary E. Winner do not appeal as all parties have stipulated that the forty-five acres acquired by the Winners are excepted from the disputed property.
- -End Footnote- - - - - - - - - - - - - - - -

[**2]
The convoluted history of this litigation began in March of 1992 n2 when appellees, Calvin Roberts, Ruth Laubmier, Rosalie Regina Wilson, Ann Eleanor Long, Donald Milton Kelius, Franklin David Kelius and Ray Kelius, filed an Action to Quiet Title to certain parcels of property in Clinton County. n3 Appellees have been represented by counsel throughout this litigation. John Ardell Pursley and George W. Pedlow, III, two of the heirs of the Ruth Pursley Estate have acted on behalf of the estate. All Pursley heirs have acquiesced to such representation. n4 On May 27, 1992, Constance Messerly Kehoe filed an Answer on behalf of the Dorothy P. Messerly heirs, being herself and Anne Messerly Cooper Chen. No one has appeared since on behalf of the Messerly heirs.

- -Footnotes- - - - - - - - - - - - - - - - -
n2 A prior action involving the same parcel and the same parties or their predecessors was voluntarily discontinued in 1976.

n3 The parcels at issue are the Robert and James Devling parcel containing 233.8 acres and the James Moore parcel containing 96 acres in Thomas Willing Warrants 3476 and 3495, excepting and reserving the following two parcels:

a. That certain piece, parcel, and tract of land conveyed in September 1915 in Clinton County Deed Book 89, Page 492, and b. That portion of said parcels acquired by Forney D. Winner and Mary E. Winner, his wife, through a prior Action to Quiet Title filed in Clinton County to No. 46 January Term, 1968, and being Tract P/3, 45 acres, Thomas Willing Warrant No. 3495. [**3]

n4 Although appellants proceeded pro se throughout this litigation, they have retained counsel for the purposes of this appeal.
- -End Footnotes- - - - - - - - - - - - - - - -

After a hearing on October 2, 1995, in which extensive testimony was given by witnesses for both parties, the trial court held that appellees had established prima facie evidence that they were owners in fee simple and entitled to possession of the subject property; and that appellants would be forever barred from claiming any interest in the property unless they commenced an Ejectment Action within thirty days. Subsequently, appellants filed an Ejectment Action on November 6, 1995 to which appellees filed Preliminary Objections for failure to comply with the form required by the applicable rules of civil procedure. These Preliminary Objections were disposed of by the trial court's order dated November 30, 1995, which granted appellants the right to file a new ejectment claim.

After an amended action was filed, Preliminary Objections were again raised. Appellees asserted a collateral estoppel claim based on the order entered in the Quiet Title Action. The trial [**4] court dismissed the Preliminary Objections and ordered appellees to file a responsive pleading within twenty days. Appellants sought leave to amend their amended action and this was granted. Subsequently, the amended complaint was filed and answered.

Thereafter, appellees filed a Motion for Summary Judgment raising res judicata and collateral estoppel. Appellees also filed a Motion for Judgment on the Pleadings whereby they alleged procedural defects in appellants' Amended Complaint in Ejectment. The trial court, on July 23, 1996, filed a final decree dismissing appellants' Amended Complaint in Ejectment with prejudice and barring appellants from claiming any interest in the subject premises. n5

- -Footnote- - - - - - - - - - - - - - - - -

n5 This appeal is complicated by the trial court's final decree which fails to explicitly specify whether it is granting the Motion for Summary Judgment, the Motion for Judgment on the Pleadings, or both. Additionally, the trial court fails to specify the grounds upon which appellants' claim is

barred.
- -End Footnote- - - - - - - - - - - - - - - -

The Estate [**5] of Ruth Pursley appeals the final decree, raising the following issues for our review:

(1) Whether the trial court exceeded its authority by deciding the merits of the Action to Quiet Title as if it were an Action in Ejectment. [*478]
(2) Whether the Appellants' Amended Complaint in Ejectment was inconsistent with the Pennsylvania Rules of Civil Procedure.
(3) Whether the trial court's October 2, 1995 Order in the Appellees' Action to Quiet Title bars the Appellants from litigating the issue of title in the Ejectment Action under the doctrine of collateral estoppel.
(4) Whether the trial court's October 2, 1995 Order in the Appellees' Action to Quiet Title bars the Appellants from litigating the issue of title in the Ejectment Action under the doctrine of res judicata.
(5) Whether the trial court erred in granting Appellees' Motion for Summary Judgment (although unclear whether or not the trial court did this).
(6) Whether the trial court erred in granting Appellees' Motion for Judgment on the Pleadings (although unclear whether or not the trial court did this).
(7) Whether the matters to be considered in the Ejectment Action showed that there was no [**6] genuine issue as to any material fact and that the Appellees were entitled to a judgment as a matter of law.
(8) Whether Appellants' Ejectment Action set forth allegations not previously considered by the trial court in appellees' Action to Quiet Title.

Appellants' brief at pages 5-6. n6

- -Footnote- - - - - - - - - - - - - - - - -
n6 The issues presented for our review have been renumbered for the purposes of this appeal.
- -End Footnote- - - - - - - - - - - - - - -

Initially, we note that a trial court's decision will generally not be reversed in the absence of an abuse of discretion or a fundamental error in applying the correct principles of law. In re Deed of Trust of Rose Hill Cemetery Association, 527 Pa. 211, 590 A.2d 1 (1991). Abuse of discretion is found only where the trial court failed to follow legal procedures or misapplied the law. Tagnani v. Tagnani, 439 Pa. Super. 596, 654 A.2d 1136 (1995).

Appellants' first argument is that the trial court exceeded its authority in the Action to Quiet Title when it decided the merits of both parties' claim of title. We [**7] agree.

An Action to Quiet Title is an action at law which was created by Pennsylvania Rule of Civil Procedure 1061. Pursuant to Pa.R.C.P. 1061(b), an Action to Quiet Title may be brought:
(1) To compel an adverse party to commence an Action of Ejectment;
(2) Where an Action of Ejectment will not lie to determine any right, lien, title or interest in the land to determine the validity or discharge of any document, obligation or deed effecting any right, lien, title or interest in land;
(3) To compel an adverse party to file, record, cancel, surrender or satisfy of record, or admit the validity, invalidity or discharge of, any document, obligation or deed affecting any right, lien, title or interest in land; or
(4) To obtain possession of land sold at judicial or tax sale.

While appellees' Complaint in the Action to Quiet Title was not specific as to which remedy appellees were seeking, it is clear that appellees were not proceeding pursuant to Pa.R.C.P. 1061(b)(3) or (4). Additionally, as the trial court did order appellants to file an Action of Ejectment, we can effectively find that the trial court proceeded pursuant to Rule 1061(b) (1) and Rule 1066(b)(1). [**8] n7

The scope of a proceeding brought under Rule 1061(b)(1) is narrow, limited solely to a determination of whether "the

Court has jurisdiction under the facts [established by plaintiff's possession] to compel the Defendant to bring his action [in ejectment]." Schimp v. Allaman, 353 Pa. Super. 232, [235], 509 A.2d 422, 423-24 (1986) (quoting Spangler v. Trogler, 228 Pa. 217, 218, 226, 77 A. 495 (1910)...; see also Seven Springs Farm, Inc. v. King, 235 Pa. Super. 450, [*479] 344 A.2d 641, 644, 643 n.4 (1975) (the merits of the dispute, the title and right to possession, are not determined in an action brought under [Rules 1061(b)(1) and 1066]...the issue is merely who is in possession for the purposes of bringing an action for ejectment...").

Sutton v. Miller, 405 Pa. Super. 213, 222-23, 592 A.2d 83, 88 (1991) (emphasis added).

- -Footnote- - - - - - - - - - - - - - - - - -
n7 Pa.R.C.P. 1066(b)(1) provides that upon granting plaintiff relief pursuant to Rule 1061(b)(1), the court "shall order that the defendant be forever barred from asserting any right, lien, title or interest in land inconsistent with the interest or claim of the plaintiff set forth in his complaint, unless the defendant takes such action within (30) days thereafter." The trial court in this matter did order appellants to file an Action in Ejectment within thirty days or be so barred.
- -End Footnote- - - - - - - - - - - - - - - -

[**9]
In this matter, however, the trial court went beyond the narrow scope of an Action to Quiet Title pursuant to Pa.R.C.P. 1061(b) (1), heard substantial testimony from both parties' witnesses and made a specific finding on the merits that appellees had a superior claim of title and thus were "entitled to possession of the land." This is clearly improper. Id; Schimp v. Allaman, supra (voluminous testimony taken was not relevant to the particular controversy involved in proceeding to quiet title under Rule 1061(b) (1) because such proceedings are simply to determine whether a court has jurisdiction under the facts to compel defendant to bring

his action, not to decide the issue of title on the merits). As discussed below, the dismissal of appellants' Ejectment Action without a hearing was a direct result of the trial court's improper and premature determination that appellees were entitled to possession of the subject property in the Quiet Title Action. This is an abuse of discretion.

The trial court's Final Decree in the Ejectment Action fails to specify whether it was granting appellees' Motion for Judgment on the Pleadings, appellees' Motion for Summary Judgment, or both. [**10] However, a trial court's order dismissing a case before trial is properly characterized as either a judgment on the pleadings or a summary judgment. Demmler v. Smithkline Beecham Corp., 448 Pa. Super. 425, 671 A.2d 1151 (1996).

First, we will address appellants' argument that the trial court improperly granted appellees' Motion for Judgment on the Pleadings. The Motion for Judgment on the Pleadings was based on appellees' contention that appellants failed to comply with the pleading rules as set forth by the Pennsylvania Rules of Civil Procedure; i.e., specifically that appellants' abstract of title was insufficient. While the trial court does note in its Final Decree that appellants' Amended Complaint was "inconsistent with the pleading rules," there is no further discussion of this issue, nor does the trial court state that this was a determining factor in its decision to dismiss the action with prejudice. However, we find appellees' objection to the form of the pleading was waived by their failure to raise preliminary objections in response to the Amended Complaint. See, Pa.R.C.P. 1028(a)(2)(failure of a pleading to conform to law or rule of court is to be raised by preliminary [**11] objection); Pa.R.C.P. 1032 (failure to raise such an objection by preliminary objection results in waiver); see also Kazanjian v. Cohen, 175 Pa. Super. 195, 103 A.2d 491 (1954) (appellants who failed to raise by preliminary objection contentions that Complaint in Action in Ejectment did not adequately describe the premises, did not contain a sufficient abstract of title and notice of termina-

tion was incomplete were precluded from later raising such objections) (emphasis added).

The wording of the final decree suggests that the ultimate basis for the trial court's decision was not inconsistencies in the pleadings, but that the claim was barred under the doctrines of collateral estoppel and/or res judicata by its prior decree of October 2, 1995 in which right to possession was decided pursuant to the Action to Quiet Title. n8 After careful review, we find both collateral estoppel and res judicata to be inapplicable to this case.

- -Footnote- - - - - - - - - - - - - - - - - -
n8 The trial court's final decree reads, in pertinent part, as follows:

[Appellees] filed a Motion for Summary Judgment and for Judgment on the Pleadings contending [Appellants] are barred from relitigating the issues previously raised in the Quiet Title Action and are bound under the Doctrine of Collateral Estoppel by the Court's prior rulings. [Appellants] have filed an affidavit containing numerous documents allegedly substantiating their position.

[Appellants] have raised no new allegations which would cause the Court to reach findings of fact and conclusions of law inconsistent with those which formed the basis for the Decree of October 2, 1995.
- -End Footnote- - - - - - - - - - - - - - - - -

[**12]
Under the doctrine of collateral estoppel, determination of particular questions [*480] of fact essential to a judgment which are actually litigated and determined by final judgment are conclusive between parties in any subsequent action on a different cause of action. Schubach v. Silver, 461 Pa. 366, 336 A.2d 328 (1975). The essential elements for a valid plea of collateral estoppel are as follows:

1. Identity of the issues decided in the prior adjudication.
2. Final judgment on the merits in the prior adjudication.
3. The party against whom the plea is asserted was a party in the prior adjudication.
4. The party against whom the plea is asserted had a full and fair opportunity to litigate the issue in question in the prior action.
5. The determination in the prior proceeding was essential to the judgment.

Safeguard Mutual Insurance Co. v. Williams, 463 Pa. 567, 345 A.2d 664 (1975); City of Pittsburgh v. Zoning Board of Adjustment of the City of Pittsburgh, 522 Pa. 44, 559 A.2d 896 (1989).

The only questions at issue in the prior Action to Quiet Title should have been: (1) whether appellees are in possession; (2) whether a dispute as to [**13] title exists; and (3) whether an order should be issued on appellants compelling them to file an action in ejectment. Schimp v. Allaman, supra at 235, 509 A.2d at 424. The issues applicable to an Action in Ejectment are significantly different. "Ejectment is a possessory action wherein a plaintiff must prove the right to exclusive possession vis-a-vis proof of paramount title." Sutton v. Miller, supra at 225, 592 A.2d at 89 (citing Doman v. Brogan, 405 Pa. Super. 254, 263, 592 A.2d 104, 108 (1991)). Therefore, it cannot be said that there was an identity of issues in the two matters.

Additionally, that appellees had superior title was not only not essential to the judgment in the Quiet Title Action, but such a determination was improper. Seven Springs Farm, Inc. v. King, supra. Further, final judgment in the matter of title is specifically precluded in Actions to Quiet Title under 1061(b) (1) by cases such as Sutton v. Miller, supra and Schimp v. Allaman, supra. Finally, it cannot be said that appellants had a full and fair opportunity to litigate the issue of title in the prior proceeding where that issue was not properly before the court at that time. [**14]

We find the doctrine of res judicata to be similarly inapplicable to the instant matter. Under the doctrine of res judicata, a final judgment on the merits is conclusive of the rights of the parties and can constitute a bar to a subsequent action involving the same claim, demand or cause of action and issues determined therein. Keystone Building Corp. v. Lincoln Savings & Loan Association, 468 Pa. 85, 360 A.2d 191 (1976).

In order for res judicata to bar relitigation of an action, there must be concurrence of four conditions:

1. Identity of the things sued upon.
2. Identity of the cause of action.
3. Identity of the parties to the action.
4. Identity of the quality or capacity of the parties.

City of Pittsburgh, supra. Once the concurrence of the identities is found to exist, it must be determined whether the ultimate and controlling issues have been decided in a prior proceeding in which the present parties actually had an opportunity to appear and assert their rights. Callery v. Municipal Authority of Blythe Township, 432 Pa. 307, 243 A.2d 385 (1968). Because of the distinct nature of the two actions as discussed above, there is no identity [**15] of the cause of action. Additionally, as the case-law pertaining to proceedings in Actions to Quiet Title pursuant to 1061(b)(1) specifically preclude the trial court to have made a determination of title based on the merits, we find that "the ultimate and controlling issues" could not have properly been determined in that action.

Based on the above findings, we conclude that the trial court was in error to dismiss the instant action on the basis of either summary judgment or judgment on the pleadings. Our standard of review for a trial court's grant of summary judgment is well established:

[*481] summary judgment is properly granted where "there is no genuine issue as to any material fact and...the moving party is entitled to judgment as a matter of law." Pa.R.C.P. 1035[.2]. Summary judgment may be granted only where the right is clear and free from doubt. Musser v. Vilsmeier Auction Co., 522 Pa. 367, 369, 562 A.2d 279, 280 (1989). The moving party has the burden of proving that there is no genuine issue of material fact. Thompson Coal Co. v. Pike Coal Co., 488 Pa. 198, 412 A.2d 466 (1979). The record and any inferences therefrom must be viewed in the light most favorable [**16] to the nonmoving party, and any doubt must be resolved against the moving party. Davis v. Pennzoil, 438 Pa. 194, 264 A.2d 597 (1970). The trial court will be overturned on the entry of summary judgment only if there has been an error of law or a clear abuse of discretion. Hetrick v. Apollo Gas Co., 415 Pa. Super. 189, 608 A.2d 1074 (1992).

First Wisconsin Trust Co. v. Strausser, 439 Pa. Super. 192, 198, 653 A.2d 688, 691 (1995).

Our standard of review for a trial court's grant of a judgment on the pleadings is as follows: "[A] motion for [judgment on the pleadings] is in the nature of a demurrer; all of the opposing party's well-pleaded allegations are viewed as true but only those facts specifically admitted by him may be considered against him." Karns v. Tony Vitale Fireworks Corporation, 436 Pa. 181, 184, 259 A.2d 687, 688 (1969) (citation omitted). Judgment on the pleadings may be granted only where the pleadings and any documents attached thereto create no material issues of fact and the case is so clear that a trial would clearly be a fruitless exercise. Id.

Pursuant to either standard, we find that appellants' Amended Complaint in the Ejectment [**17] Action clearly raises a genuine issue of material fact regarding title to the subject premises. Appellees and the trial court attempt to resolve this issue as having already been decided in the Action to Quiet Title pursuant to either collateral estoppel

or res judicata; i.e., because appellants make the same claim to title as they made in the Action to Quiet Title, "[appellants] have raised no issues or allegations which would cause this Court to reach findings of fact or conclusions of law inconsistent with those which formed the basis for the Decree of October 2, 1995." However, the trial court in the Quiet Title Action determined that appellants had failed to demonstrate entitlement to possession of the subject land on the basis of the five documents appellants submitted into evidence. In the Affidavit accompanying their Amended Complaint in Ejectment, appellants attach voluminous documentation which they contend comprise evidence of their claim to title. The trial court refused to consider this additional documentation on the basis that the issue of appellants' claim to title had already been litigated and decided.

As discussed above, it was improper for the trial court to [**18] make any finding in the prior action other than whether appellees are in possession; whether a dispute as to title exists; and whether an order should be issued on appellants compelling them to file an action in ejectment. Schimp v. Allaman, supra at 235, 509 A.2d at 424. Additionally, we have determined that the doctrines of collateral estoppel and res judicata are inapplicable to the instant matter. Therefore, it was clearly an abuse of discretion to rely upon the premature findings in the Quiet Title Action as dispositive of the issue of which party has a superior claim of title in the Ejectment Action and a bar to the consideration of further documentation in support of the claim to title which was set forth by appellants in both actions.

Accordingly, the Final Decree of the court below is reversed and the case remanded to the court below for a hearing on the merits in the Ejectment Action.

Jurisdiction is relinquished.

IN THE COURT OF COMMON PLEAS OF CLINTON COUNTY, PENNSYLVANIA
CIVIL ACTION - LAW

P. CALVIN ROBERTS, RUTH LAUBMIER, ROSALIE REGINA WILSON, ANN ELEANOR LONG, DONALD MILTON KELIUS. FRANKLIN DAVID KELIUS, and RAY KELIUS,
Plaintiffs

v.

Estate of RUTH PURSLEY, MELLON BANK CENTRAL, N.A., Executor, DOROTHY P. MESSERLY,
Defendants
NO. 432 - 92 (Civil)

CERTIFIED FROM THE CIVIL RECORDS OF
THE COURT OF COMMON PLEAS
AT LOCK HAVEN, PA
THIS 7 DAY OF November, 1997
BARBARA L. EMERY, PROTHONOTARY
CLINTON COUNTY, PENNSYLVANIA

NON-JURY TRIAL, ACTION TO QUIET TITLE — October 2, 1995
NON-JURY TRIAL, EJECTMENT — October 3, 1997

APPEARANCES: Charles R. Rosamilia, Jr., Esquire, for Roberts, et al.

Scott T. Williams, Esquire, for Messerly
John Ardell Pursley, et al., pro se

DISCUSSION

This Action in Ejectment originally began as an Action to Quiet Title brought by Plaintiffs (n1) in 1992. Following a nonjury trial on October 2, 1995, this Court determined that

- -Footnote- - - - - - - - - - - - - - - - -
(n1)Throughout this Opinion the Court will refer to the Kelius parties as the Plaintiffs and the Pursley parties as the Defendants even though the Pursleys are the parties with the initial burden of proof in the ejectment action.
- -end Footnote- - - - - - - - - - - - - - -

[*2] Plaintiffs were in possession, a dispute as to title existed, and an Order should be entered compelling Defendants to file an Action in Ejectment. (n2)

- -Footnote- - - - - - - - - - - - - - - - -
(n2) As pointed out by the Panel Decision of the Superior Court filed August 13, 1997, this Court exceeded its authority in the Action to Quiet Title when it determined that Plaintiffs, prima facie, had established superior claims to title. While this Court has incorporated the testimony taken on October 2, 1995, in this ejectment trial, it is appropriate to note that Defendants, now represented by counsel, have substantially more effectively presented their case.
- -end Footnote- - - - - - - - - - - - - - -

The initial burden in an Action in Ejectment is clear: to establish a right to immediate exclusive possession. In order to recover a party must show title at the commencement of the action and can recover, if at all, only on the strength of his own title, not because of weakness or deficiency of title of another. Hallman v. Turns, 482 A.2d 1284 (Pa. Super. 1984). It is also clear that to support an Action in Ejectment the evidence must be sufficient to identify the land in dispute and establish the right to possession thereof. The burden of identifying and locating the land clearly rests

upon the moving party, who has the burden of presenting definite and certain evidence of the boundary of the property in controversy. Hallman, supra.

While the record made by the parties is voluminous (n3), in determining the merits of this controversy the Court began with Plaintiffs' Exhibit 1, a 1932 survey prepared by the Pennsylvania Department of Forests and Waters. The 1932 Forests and Waters survey purports to be of the "Keating Lands Lot Division" in Keating Township, Clinton County.

- -Footnote- - - - - - - - - - - - - - - - -
(n3) The Court admitted, over the objection of Plaintiffs, Defendants' Exhibits A through M consisting of six (6) bound volumes containing numerous exhibits, all of which are documents located within the Clinton County Courthouse. The Court specifically takes judicial notice of its own records.
- -end Footnote- - - - - - - - - - - - - - -

The Court accepts Plaintiffs' Exhibit 1 (which was also introduced by Defendants) as being a reconstruction [*3] of the Keating and Company Land Division to which reference is made in various Deeds with respect to "Keating and Company Allotment Numbers." While no allotment numbers appear with respect to the various parcels in Thomas Willing Warrant 3476, allotment numbers are shown with some frequency on the remaining warrants in Plaintiffs' Exhibit 1. The Court's acceptance of Plaintiffs Exhibit 1, based upon the fact that both parties vouch for its authenticity, establishes the boundaries of the various conveyances within Warrant 3476 and specifically establishes the boundaries of the parcels in dispute.

With respect to Defendants' obligation to establish their title, the Court is, quite frankly ,impressed with the magnitude of the research conducted by them with respect to Warrant 3476. The Court understands and accepts Defendants' theories with respect to the history of Warrant 3476 and specifically finds that Defendants have proven by a preponderance of the evidence all facts and inferences neces-

sary to establish the validity of their claims as specifically set forth in Defendants' Exhibit A.

With respect to Defendants chain, the Court finds that the 300-acre parcel acquired by Defendants' predecessors through Treasurer's sales consist of the 96-acre Moore parcel and that portion of the 233.8 acre Devling parcel which lies within Warrant 3476. The Court accepts, with only insignificant questions, Defendants' chain tracing back to the 1854 conveyance to Devling.

With respect to Plaintiffs' claims, the parties are in agreement that Plaintiffs' chain is unremarkable back to the 1901 Deed from Byron Hamlin to Henry E. Shade, recorded in Clinton County Deed Book 64, Page 744. The parties are also in agreement that such 1901 Deed [*4] describes the Moore and Devling parcels as set forth in Plaintiffs' Exhibit 1. Unfortunately for Plaintiffs, it is impossible to further establish their title with any particularity. The Deed immediately prior to the Hamlin to Shade conveyance is a 1884 conveyance from Jenette Redfield to Byron Hamlin, et al. That Deed purports to convey 297,428 acres situate variously in McKean, Potter, Cameron, Clinton, Clearfield, and Clarion Counties. The Deed into Redfield from William Keating, et al., in September of 1884 contains a description of the 297,428 acres which traces back to the late 18th century. Among the various parcels referred to in the Keating to Redfield conveyance are 36 different tracts or parcels of land in 36 separately numbered Thomas Willing Warrants. This reference to 36 different Willing Warrants is the best Plaintiffs can do to prove their title in an attempt to defeat Defendants' title. Nor have Plaintiffs received any assistance through Defendants' research efforts. The best Defendants have been able to do on behalf of Plaintiffs' claim is to show the acquisition by Hamlin of 160.4 acres arising out of Treasurer's sales to Wilcox and Borie. In any event, the Court, as previously discussed, accepts Defendants' position with respect to Plaintiffs' chain and specifically finds there is no evidence whatsoever to prove that Hamlin ever acquired 300 acres in Thomas Willing Warrant 3476. Therefore, while the 1901 Deed from Hamlin to Shade was un

doubtedly prepared in reliance upon the Keating and Company Allotment Map of the Moore and Devling parcels within Warrant 3476, Plaintiffs cannot prove their predecessors ever acquired title to the acreage contained within that description.

Having found that Defendants have established their claim to title by a preponderance of the evidence and that Plaintiffs have failed to establish their title prior to 1901, the Court must [*5] consider the applicability of the Act of June 12, 1931 (21 P.S. 351) which provides that "every such Deed conveyance, contract or other instrument of writing which shall not be acknowledged or proved and recorded, as aforesaid, shall be adjudged fraudulent and void as to any subsequent bona fide purchaser...without actual or constructive notice..." As set forth by the Superior Court in Long John Silver's. Inc. v. Fiore, 386 A.2d 569 (Pa. Super. 1978), the Recording Statute protects subsequent purchasers by giving a subsequent bona fide purchaser for value without notice of a prior transaction priority over the equitable estate of the first owner. However, either actual or constructive notice is sufficient to prevent the subsequent purchaser from acquiring the status of a bona fide purchaser.

The only recorded document, with the exception of the Treasurer's Sale and Commissioners' Sale ledgers, which would establish record notice to Plaintiffs is a conveyance from Ray Pursley to D. C. Pursley and Phillip Keller of a one-third (1/3) interest in 300 acres in a Thomas Willing Warrant recorded in 1914. Significantly, that document does not identify the warrant as Willing Warrant 3476, although such was the intent based upon the Court's acceptance of Defendants' extensive research. The 1896 Treasurer's sale deed to Barker, Keller and Pursley initially relied upon by Defendants was not recorded until 1967. The 1924 Treasurer's sale to David C. Pursley was, likewise, not recorded until 1967. To the extent, therefore, that Plaintiffs did not have actual or constructive notice of Defendants' claim, the Recording Statute appears to grant Plaintiffs superior title.

With respect to actual notice, the Court specifically finds,

based upon the testimony of Defendants' representatives, that Defendants have had little, if any, involvement with the parcels [*6] in dispute. Indeed, there is virtually no evidence in the record to suggest that present Defendants ever set foot on these parcels until this litigation began. Nor, based on the testimony, is there any suggestion whatsoever that any activities by third parties on the parcels have given Plaintiffs actual notice of Defendants' claims.

With respect to constructive notice, Defendants argue Plaintiffs were obligated to engage in the same extensive and voluminous research as they performed in attempting to determine title. As suggested by the United States District Court for the Eastern District of Pennsylvania in Reiter v. Kille, 143 F. Supp. 590 (1956), Plaintiffs, following the usual procedure in a search of title under Pennsylvania law and practice, would be entitled to rely upon the Recording Act. To require Plaintiffs to make a further investigation dehors the record would defeat rather than give effect to the Recording Act. This Court takes judicial notice of the standard title search practice in Clinton County in 1964 which would have required a search of sixty years. Here, the 1901 Hamlin to Shade conveyance would meet such requirement. In accordance with standard Clinton County title search practices, therefore, no reason would have existed to conduct an exhaustive search of the Treasurer's and Commissioners' sale conveyances in the 19th century. In 1964 Milton S. and Mary E. Kelius, being bona fide purchasers for value without actual or constructive notice of the claim of the Pursley interests, were entitled to rely upon the Recording Act and, therefore, acquired title under that Act superior to any legal or equitable estate of the Pursley interests.

With respect to Plaintiffs argument that they acquired title by adverse possession, the Court initially notes its observations in the Order of October 2, 1995, that Plaintiffs had engaged [*7] in various activities, including posting, hunting, timbering, leasing, paying taxes, and constructing a road through the premises to an adjoining parcel, which might suggest they had continuously, openly, notoriously,

and hostilely held the property since 1964. While no testimony was presented in the ejectment proceedings to suggest those observations were not appropriate, photographs of the premises show the various roads through the premises to be not as substantial as the Court had initially assumed. In any event, the premises being uninhabited woodlands, the doing of temporary acts upon the land without an intention to occupy the land for residence, cultivation, or some other permanent use consistent with the nature of the property does not generally constitute an actual possession sufficient to establish a claim of adverse possession. Standard Pennsylvania Practice 2nd, 120:209. After further reflection, this Court does not believe the sporadic and intermittent activities undertaken by Plaintiffs on the premises, such as hunting, timbering, constructing forest roads or leasing the premises for oil and gas exploration, were sufficient to establish continuous, open, notorious, and hostile possession of the premises. As suggested by Defendants, Plaintiffs never took possession of the 300 acres by cultivation or residence, never fenced the property, and never established any other enclosure of a substantial character. Under such facts, Plaintiffs have failed to establish their claim of adverse possession.

DECREE

NOW, this 6th day of November, 1997, IT IS HEREBY ADJUDGED AND DECREED that, while Defendants have established superior title and Plaintiffs have failed to establish title by adverse possession, judgment is entered in favor of Plaintiffs and against Defendants with [*8] respect to Defendants' action in ejectment based solely upon the provisions of the Pennsylvania Recording Act.

BY THE COURT:
/s/ Williamson, J.

cc: Charles R. Rosamilia, Jr., Esquire
Scott T. Williams, Esquire

John Ardell Pursley
Court Administrator

P. CALVIN ROBERTS, RUTH LAUBMIER, ROSALIE REGINA WILSON, ANNA ELEANOR LONG, DONALD MILTON KELIUS, FRANKLIN DAVID KELIUS, AND RAY KELIUS

v.

ESTATE OF RUTH PURSLEY, MELLON BANK CENTRAL NA, EXECUTOR, DOROTHY F. MESSERLY, FORNEY D. WINNER AND MARY E. WINNER, THEIR HEIRS, EXECUTORS, ADMINISTRATORS AND ASSIGNS, AND ANY PERSONS KNOWN OR UNKNOWN CLAIMING ANY RIGHT, TITLE, LIEN OR INTEREST IN THE SUBJECT PREMISES THROUGH OR UNDER THEM;

APPEAL OF: CONSTANCE KEHOE, ADMINISTRATRIX FOR THE ESTATE OF DOROTHY F. MESSERLY;

P. CALVIN ROBERTS, RUTH LAUBMIER, ROSALIE REGINA WILSON, ANNA ELEANOR LONG, DONALD MILTON KELIUS, FRANKLIN DAVID KELIUS, AND RAY KELIUS

v.

ESTATE OF RUTH PURSLEY, MELLON BANK CENTRAL NA, EXECUTOR, DOROTHY F. MESSERLY, FORNEY D. WINNER AND MARY E. WINNER, THEIR HEIRS, EXECUTORS, ADMINISTRATORS AND ASSIGNS, AND ANY PERSONS KNOWN OR UNKNOWN CLAIMING ANY RIGHT, TITLE, LIEN OR INTEREST IN THE SUBJECT PREMISES THROUGH OR UNDER THEM;

APPEAL OF: JOHN PURSLEY

No. 00042 Harrisburg 1998, NO. 00045 Harrisburg 1998

SUPERIOR COURT OF PENNSYLVANIA

718 A.2d 837; 1998 Pa. Super. LEXIS 2869

September 3, 1998, Argued; October 16, 1998, Filed

SUBSEQUENT HISTORY: [**1]

Applications for Reconsideration Denied August 23, 1999, Reported at: 1999 Pa. LEXIS 2545.

PRIOR HISTORY: Appeal from the Order entered December 1, 1997 in the Court of Common Pleas, Civil Division, Clinton County, at No. 432-1992. Before WILLIAMSON, J. Appeal from the Order entered December 1, 1997 in the Court of Common Pleas, Civil Division, Clinton County, at No. 432-92. Before WILLIAMSON, J.

DISPOSITION: Affirmed.

COUNSEL: Scott T. Williams, Williamsport, for Constance Kehoe.
John A. Pursley, pro se.
Charles R. Rosamilia, Jr., Lock Haven, for Roberts, Laubmier, Wilson, Long and Kelius, participating parties.
George W. Pedlow, III, pro se.

JUDGES: BEFORE: JOYCE, HESTER, JJ. and CIRILLO, P.J.E. OPINION BY CIRILLO, P.J.E.

OPINIONBY: CIRILLO

OPINION: [*839] OPINION BY CIRILLO, P.J.E.:

FILED: October 16, 1998

Constance Kehoe and John Ardell Pursley appeal from the order entered in the Court of Common Pleas of Clinton County denying their motions for reconsideration of the trial court's decree dated November 6, 1997, in which the trial court entered judgment in favor of Appellees, P. Calvin Roberts, et al. We affirm.

The convoluted history of this litigation began in March of 1992 n1 when Appellees filed an action to quiet title to certain parcels of property located in Clinton County. n2 Following a hearing on October 2, 1995, in which extensive testimony was given by witnesses for both parties, the trial court held that Appellees established prima facie evidence of fee simple ownership, which entitled them to possession of the property. As a result, [**2] the court ordered that Appellants would be forever barred from claiming any interest in the property unless they commenced an ejectment action within thirty days.

- -Footnotes- - - - - - - - - - - - - - - - - -

n1 A prior action involving the same parcel and the same parties or their predecessors was voluntarily discontinued in 1976.

n2 The parcels at issue are the Robert and James Devling parcel containing 233.8 acres and the James Moore parcel containing 96 acres in Thomas Willing Warrants 3476 and 3495, excepting and reserving the following two parcels:

a. That certain piece, parcel and tract of land conveyed in September 1915 in Clinton County Deed Book 89, Page 492, and

b. That portion of said parcels acquired by Fourney D. Winner and Mary E. Winner, his wife, through a prior Action to Quiet Title filed in Clinton County to No.46 January Term, 1968, and being Tract P/3, 45 acres, Thomas Willing Warrant No. 3495.

- -End Footnotes- - - - - - - - - - - - - - - - - -

Appellants filed an ejectment action on November 6, 1995, to which Appellees filed preliminary objections for

failure to comply with [**3] the form required by Pennsylvania Rules of Civil Procedure 1022 and 1054. See Pa.R.C.P. 1022 (requiring that every pleading be divided into paragraphs numbered consecutively and that each paragraph contain only one material allegation). See also Pa.R.C.P. 1054(a) (requiring that a plaintiff in an ejectment action describe the land in his complaint). Appellants were ordered to file an amended ejectment action that conformed to the Pennsylvania Rules of Civil Procedure. n3

- -Footnote- - - - - - - - - - - - - - - - - -
n3 After filing their amended complaint, Appellants filed a motion for the court to grant leave to amend this amended complaint. The court granted this motion; accordingly, Appellants filed a second amended complaint.
- -End Footnote- - - - - - - - - - - - - - - -

In response to Appellants second amended complaint, Appellees filed a motion for summary judgment, raising the defenses of res judicata and collateral estoppel. Appellees also filed a motion for judgment on the pleadings, whereby they alleged procedural defects in Appellants' second amended complaint in [**4] ejectment. The trial court, on July 23, 1996, filed a final decree dismissing Appellants' second amended complaint in ejectment with prejudice and barring Appellants from claiming any interest in the subject premises.

On August 13, 1997, Appellants filed an appeal from the trial court's final decree. A prior panel of this court reversed the trial court's order and remanded the case with instructions to rule on the ejectment action set forth by Appellants. Roberts v. Estate of Pursley, 700 A.2d 475 (Pa. Super. 1997). The trial court held a hearing on the merits of the ejectment action on October 3, 1997. On November 6, 1997 the trial court issued its order, finding against Appellants "based solely upon the provisions of the Pennsylvania Recording Act." n4

- -Footnote- - - - - - - - - - - - - - - - -
n4 However, in its opinion, the trial court pointed out that it was impressed with the magnitude of research conducted by Appellants with respect to the Warrant in issue.
- -End Footnote- - - - - - - - - - - - - - -

[*840]

Appellants raise the following issues for our consideration:

(1) Whether [**5] the trial court erred in applying the Pennsylvania Recording Statute/Bona fide Purchaser to the facts of this case?

(2) Whether the trial court erred by considering the Pennsylvania Recording Statute/Bona fide Purchaser Doctrine when Appellees failed to raise the aforesaid defenses at trial?

(3) Whether the record supports the Trial Court's conclusion that Appellees had no constructive or express notice of Appellants' claim?

The record indicates that Appellants were able to trace their line of title back to 1854 and the original Keating/Willing Warrant. According to the record, the Appellees' line of title was traced through a different chain back to the Keating/Willing Warrant. However, in 1901, there was a flaw in Appellees' chain of title due to an ineffective conveyance between their predecessors-in-interest.

With respect to Appellees' predecessors, the record indicates that in 1964, Milton S. Kelius and Mary Kelius purchased the parcel in dispute. In that same year, the Keliuses properly recorded their deed as prescribed by the Pennsylvania Recording Statute. n5 The Keliuses subsequently devised the parcel in dispute to Appellees, who recorded the parcel in [**6] 1975.

- -Footnote- - - - - - - - - - - - - - - - -
n5 It is important to note that, with the exception of the Treasurer's sale and Commissioner's sale ledger, the only recorded document that would establish record notice to Appellees is a 1914 conveyance of a one-third interest in

300 acres of land. Significantly, however, this recorded document does not identify the warrant as the Willing Warrant 3476. Moreover, the 1896 and 1924 Treasurer's Sale Deeds to Appellants' predecessors were not recorded until 1967. This leaves a gap of nearly 113 years where Appellants' predecessors failed to properly record their deed. Moreover, the record indicates that until the commencement of this litigation, Appellants had little or no involvement with the parcels in dispute.

- -End Footnote- - - - - - - - - - - - - - - -

The trial court determined that Appellants' chain of title dates back to 1854 and that Appellees failed to establish their title prior to 1901. The trial court then concluded that Appellees did not prove their predecessors ever acquired title to the acreage contained within the said Warrant. In so [**7] concluding, the trial court held that, but for the Pennsylvania recording statute, Appellants established their claim to title by a preponderance of the evidence.

Preliminarily, we note that appellate review of an equity matter is limited to a determination of whether the chancellor committed an error of law or an abuse of discretion. Soderberg v. Weisel, 455 Pa. Super. 158, 687 A.2d 839 (1997); Marchetti v. Karpowick, 446 Pa. Super. 509, 667 A.2d 724 (1995). The scope of review of a final decree in equity is limited and will not be disturbed unless it is unsupported by the evidence or demonstrably capricious. Soderberg, supra; Hostetter v. Hoover, 378 Pa. Super. 1, 547 A.2d 1247 (1988). However, "conclusions of law or fact, being derived from nothing more than the chancellor's reasoning from underlying facts and not involving a determination of credibility of witnesses are reviewable." Sprankle v. Burns, 450 Pa. Super. 319, 675 A.2d 1287, 1288 (1996) (quoting Krosnar v. Schmidt Krosnar McNaughton Garrett Co., 282 Pa. Super. 526, 534, 423 A.2d 370, 375 (1980)).

Appellants' first contention is that the trial court [**8] erred in applying Pennsylvania's recording statute, 21 Pa.C.S.A. § 351, n6 to the facts in this case asserting that such application is retroactive and illegal. See 21 Pa.C.S.A.

§ 351. Appellants cite Farmers National Bank and Trust Co. of Reading v. Berks County Real Estate Co., 333 Pa. 390, 5 A.2d 94 (1939), in support of this contention. In that case, our supreme court held that section 351, as [*841] amended in 1931 as to make unrecorded deeds invalid against subsequent judgment creditors, did not apply to deeds executed prior to 1931. Farmers National Bank and Trust Co. of Reading, 333 Pa. at 393, 5 A.2d at 94. In effect, the court held that retroactive application of section 351 is not permitted. Id.

- -Footnote- - - - - - - - - - - - - - - - - -
n6 Section 351 states in pertinent part: Every such deed, conveyance, contract, or other instrument of writing which shall not be acknowledged or proved and recorded . . . shall be adjudged fraudulent and void as to any subsequent bona fide purchaser or mortgagee or holder of any judgment, duly entered in the prothonotary's office of the county in which the lands, tenements, or hereditaments are situate, without actual or constructive notice unless such deed, conveyance, contract, or instrument of writing shall be recorded . . . . . before the recording of the deed or conveyance or the entry of the judgment under which such subsequent purchaser, mortgagee, or judgment creditor shall claim. 21 Pa. C.S.A. § 351.
- -End Footnote- - - - - - - - - - - - - - - - -

[**9]

Notwithstanding the fact that section 351 is not to be applied retroactively, the Pennsylvania recording statute applies to the present case pursuant to 21 Pa.C.S.A. § 444, enacted in 1775 and amended in 1893. Section 444 requires "all deeds made in the state to be acknowledged and recorded within ninety days." 21 Pa.C.S.A. § 444. Deeds not conforming to this rule will be "adjudged fraudulent and void against any subsequent purchaser . . . for valid consideration." Id. As evidenced by its language and its similarities to section 351, section 444 was also enacted to protect bona fide purchasers against "deceptious appearance of

title." See Mancine v. Concord Liberty Savings and Loan Ass'n, 445 A.2d 744, 299 Pa. Super. 260 (1982) (holding that the primary objective in recording deed is to give public notice in whom the title resides so that no one may be defrauded by deceptious appearance of title). Moreover, we adopt the theory that sections 351 and 444 of Title 21 must be read together. See Miners National Bank of Wilkes-Barre v. Kuhns, 32 Luz.L.Reg.Rep. 185, (1939).

The facts of this case involve Appellees predecessors in title, who purchased [**10] parcel of land for value and without notice of Appellants' adverse interest in such parcel. Because sections 351 and 444 are both intended to provide the same protections to bona fide purchasers, and in light of the fact that the sections must be read together, we hold that the trial court was correct in applying the Pennsylvania recording statute to the facts of this case. Miners National Bank of Wilkes-Barre, supra; Mancine, supra.

Next, Appellants contend, citing Kaiser Energy Inc. v. Commonwealth of Pennsylvania, Department of Environmental Resources, 113 Pa. Commw. 6, 535 A.2d 1255 (Pa. Commw. 1998), that the bona fide purchaser concept does not apply to the facts of the present case because Appellees' grantor did not possess legal title. In Kaiser, supra, the Commonwealth Court held that "the bona fide purchaser concept applies only to purchasers of legal title." 535 A.2d at 1258 (citing 32 P.L.E. Sales of Realty § 156 (1960)). The Commonwealth Court's decision in Kaiser, supra, is not binding on this court. Moreover, we do not find the Commonwealth Court's decision instructive; [**11] in fact, we find the Commonwealth Court's argument inconsistent with the bona fide purchaser concept contained within the recording statute of this Commonwealth.

The recording statute was intended to protect bona fide purchasers who give value for land. Long John Silver's Inc. v. Fiore, 255 Pa. Super. 183, 190, 386 A.2d 569, 573 (1978) (citing Lund v. Heinrich, 410 Pa. 341, 189 A.2d 581 (1963)). In order to qualify as a bona fide purchaser, the subsequent buyer must be without notice of a prior equitable interest. Id.

If "legal title," within the Appellant's definition, were required for a subsequent purchaser to qualify as a bona fide purchaser, the recording statute would not further its intended goals. For instance, in the typical recording statute situation, a grantor sells land to a grantee who does not record the deed; then, a subsequent buyer purchases the same land from the same grantor as the original grantee and this subsequent grantee records his deed before the first grantee. The subsequent grantee does not have "legal title" within the Appellant's definition because at the time the land was sold to him, the grantor did not [**12] have legal title to give such right. Yet, notwithstanding the fact that he does not have "legal title," he is a bona fide purchaser if at the time of the sale he was without notice of an adverse interest and value was given for the purchase of the land. See Long John Silver's, supra. As evidenced here, imposing a requirement of "legal title" to the definition of a bona fide purchaser would nearly render the recording statute useless. We, therefore, find no merit in Appellants' argument.

Appellants' next contention is that Appellees cannot be protected under the recording statute because they inherited the disputed [*842] land parcel from their predecessors-in-interest. In support of this contention, Appellants cite U.S. v. 137.02 Acres of Land, 334 F. Supp. 1021 (M.D. Pa. 1971). There, the United States District Court for the Middle District of Pennsylvania held that "heirs, who have given nothing of value in return for title, are not in the position of bona fide purchasers, mortgagees, and judgment creditors." Id. at 1024. Even though this is a correct rule of law, the trial court did not err by failing to apply it in the present case. [**13]

In Thompson v. Christie, 138 Pa. 230, 20 A. 934 (1890), our supreme court pointed out that "it is well settled that a bona fide purchaser, without notice of a secret agreement or trust, takes title discharged from such agreement or trust, and that he can convey good title even though his vendee has had actual notice." Thompson, 138 Pa. at 249, 20 A. at 934 (citations omitted); see also 77 Am.Jur. 2D Vendor and Purchaser § 509 (stating that "generally, a remote purchaser

of real estate whose purchase does not fulfill all the requisites for protection due a bona fide purchaser may nevertheless be accorded protection because of a purchaser who is entitled thereto") (citations omitted). Essentially, our supreme court's holding in Thompson, supra, extended bona fide purchaser protection to vendees who purchase land from a bona fide purchaser vendor, even where the vendee has notice of adverse interests in the property. The purpose of this rule is to "prevent a stagnation of property and to protect the first purchaser, who, being entitled to hold and enjoy, must be equally entitled to sell." 77 Am.Jur. 2D Vendor and [**14] Purchaser § 509 (citations omitted).

Under the aforesaid rationale, we extend protection to devisees and heirs who take from a bona fide purchaser. The purpose here is not to protect the heir or devisee, but to permit the bona fide purchaser to convey his land. Moreover, the application of this principle to heirs and devisees will further the policy of preventing the stagnation of property as well as the policies surrounding the bona fide purchaser concept. Long John Silver's, supra. We are not, however, extending protection to heirs and devisees who take from one who has not acquired status as a bona fide purchaser. Extending such protection would not further the underlying purpose of the recording statute and the bona fide purchaser doctrine. See Mancine, supra; Long John Silver's, supra.

In the present case, the record indicates that Milton S. Kelius and Mary Kelius, Appellees' predecessors-in-interest, were bona fide purchasers for value without notice of Appellants' predecessors' claim. The record further indicates that, in 1964, the Keliuses recorded their deed in accordance with the Pennsylvania [**15] recording statute. In 1975, the parcel in dispute was devised to Appellees from the Kelius estate. At that time, Appellees properly recorded their interest. In accordance with the principle set forth above, Appellees acquired their interest subject to the protection afforded to their predecessors as bona fide purchasers. Because the Keliuses acquired title superior to that of Appellants' predecessors, Appellees have, therefore, acquired title

superior to that of the Appellants.

Appellants argue pursuant to Long John Silver's, supra, that, because Appellants and Appellees did not purchase the land from a common grantor, Appellees cannot be bona fide purchasers for purposes of the recording statute. Appellants misconstrue the Long John Silver's decision.

In their brief, Appellants quote the following excerpt from Long John Silver's: At common law, the first buyer's deed was superior to subsequent deeds to the property conveyed by the same grantor, regardless of whether the first deed was without consideration and the subsequent deed was to a bona fide purchaser. The Pennsylvania recording statute, however, protects [**16] subsequent purchasers by giving a subsequent purchaser for value without notice of prior transaction priority over the equitable estate of the first owner. Long John Silver's, 255 Pa. Super. at 190, 386 A.2d at 572-73. The language in the foregoing quote does not suggest that in order for the Pennsylvania recording statute to apply, the two parties in dispute must have received their interest from a common grantor. It merely demonstrates a situation where the [*843] recording statute applies. On its face, the Pennsylvania recording statute does not specify whether parties in dispute must have acquired their land from a common grantor. See 21 Pa.C.S.A. § 444. Furthermore, in Farmer v. Fisher, 197 Pa. 114, 118, 46 A. 892, 893 (1900), our supreme court specifically held, "when . . . cases speak in this connection of deeds from the same grantor, they do not mean necessarily from the same person, but deeds purporting to convey the same title, whether by grantor, his heir, his heir's grantee or any other person in the devolution of the same line of title." Id.

In light of the supreme court's decision in Fisher, supra, and taking [**17] into consideration the language of the recording statute, it is clear that Appellants' interpretation of Long John Silver's, supra, is erroneous. Furthermore, in the present case, the disputed deeds purport to convey the same title, thereby making it clear that the recording statute is applicable. See Fisher, supra. Therefore, the trial court acted properly by applying the Pennsylvania recording stat-

ute to the facts of this case.

Appellants next contend that the trial court erred by ruling that Appellants did not comply with the Pennsylvania recording statute. Appellants argue they were in compliance with the statute because record of title to the land was recorded in the Prothonotary's Book of Treasurer's Acknowledgments of Unseated Lands, thereby giving constructive notice of their predecessors' interest in such parcel.

The Pennsylvania Supreme Court has held: it is well settled that purchasers . . . of real estate are affected not only by matters of which they had actual knowledge and by what appeared in the office of the recorder of deeds and in the various courts of record whose territorial jurisdiction embraced the land in dispute, [**18] but as well 'by what they could have learned by inquiry of the person in possession and of others, who they had reason to believe, knew of facts which might affect title.' Sidle v. Kaufman, 345 Pa. 549, 557, 29 A.2d 77, 81 (1942) (quoting Salvation Army Inc. Trustees v. Lawson, 293 Pa. 459, 463, 143 A. 113, 114 (1928)). However, a purchaser will not be prejudiced by facts, which he could not have learned by inquiry. Salvation Army Inc. Trustees, 293 Pa. at 462, 143 A. at 114 (citing Lower's Appeal, 1 Walk 404, 5 Leg.Daz. 45 (1873)).

According to the record in the present case, both parties agree that the office of the Recorder of Deeds does not contain any record of an interest adverse to that of Appellees. In fact, Appellants' predecessors failed to record their deed for nearly 113 years. Moreover, Appellees and their predecessors had no reason to know, up until the time of this litigation, of any person in possession, or of any person who might know of facts that may have affected their title. Appellees had no reason to know of the record contained in the Prothonotary's Book of Treasurer's Acknowledgements of Unseated Lands, and it is not [**19] likely that inquiry would have led to such knowledge. Therefore, Appellants' argument that Appellees had constructive knowledge due to the record of the Treasury Deed lacks merit and the trial court correctly held that Appellees and their predecessors were without notice of Appellants' adverse interests.

With respect to their next issue, Appellants contend that Appellees failed to raise in their pleadings, the issues of notice and bona fide purchaser. Appellants argue that such defenses were waived at trial because Appellees failed to raise such defenses in their preliminary objections, answer or reply in the trial court proceedings. See Pa.R.C.P. 1032. We disagree.

Rule 1032 states in pertinent part that "[a] party waives all defenses and objections which he does not present either by preliminary objection, answer or reply . . . ." Pa.R.C.P. 1032. Instantly, Appellees have complied with this Rule, as they specifically stated in paragraphs 11, 12, and 13 of their answer to Appellants' amended complaint that "the chain of title of the [Appellants] is defective in that they did not record their deed in a prompt manner, and delayed recording until after the recording [**20] of the [Appellees'] title which gave the [Appellees] superior title to the subject property." This [*844] denial was stated in response to Appellants' allegation that Appellants had been in possession of the disputed parcel of land since 1896.

We note that embodied within the recording statutes are provisions that require a deed to be recorded in a prompt manner and if the deed is not recorded within the prescribed time period it will be "adjudged fraudulent and void against any subsequent purchaser . . . for valid consideration." See 21 Pa.C.S.A. § 444. Moreover, and as stated above, the purpose of the recording statutes is to protect bona fide purchasers. See Mancine, supra. As such, Appellees pleaded sufficient facts in their denial of Appellants' allegations as set forth above so as to bring the case within section 444. Thus, Appellees satisfied the Rule 1032 requirements and did not waive their defenses under the Pennsylvania recording statute. Appellant's argument, therefore, is without merit.

Appellant's final claim is that the record lacks any evidence supporting the trial court's determination that Appellees had no actual or constructive [**21] notice of Appellants' adverse interests. We disagree. As stated above, the record contains a voluminous history of the land tract

in issue dating back as far as 1854. It clearly shows that Appellants' predecessors had failed to record for approximately 113 years, finally recording in 1967. It further illustrates that Appellees' predecessors properly recorded in 1964, after purchasing the land for value. The fact that Appellants' predecessors failed to record their deed for more than a century, when the statute requires recording within 90 days, is clearly enough evidence for the trial court to have determined that Appellees failed to have notice of Appellants' adverse interests. 21 Pa.C.S.A. § 444.

Order affirmed.

P. CALVIN ROBERTS, RUTH LAUBMIER, ROSALIE REGINA WILSON, ANNA ELEANOR LONG, DONALD MILTON KELIUS, FRANKLIN DAVID KELIUS, AND RAY KELIUS,

v.

ESTATE OF RUTH PURSLEY, MELLON BANK CENTRAL, N.A., EXECUTOR, DOROTHY P. MESSERLY, FORNEY D. WINNER, AND MARY E. WINNER, THEIR HEIRS, EXECUTORS, ADMINISTRATOR AND ASSIGNS, AND ANY PERSONS KNOWN OR UNKNOWN CLAIMING ANY RIGHT, TITLE, LIEN OR INTEREST IN THE SUBJECT PREMISES THROUGH OR UNDER THEM,

PETITION OF: CONSTANCE KEHOE, ADMINISTRATRIX FOR THE ESTATE OF DOROTHY F. MESSERLY;

P. CALVIN ROBERTS, RUTH LAUBMIER, ROSALIE REGINA WILSON, ANNA ELEANOR LONG, DONALD MILTON KELIUS, FRANKLIN DAVID KELIUS, AND RAY KELIUS,

v.

ESTATE OF RUTH PURSLEY, MELLON BANK CENTRAL, N.A., EXECUTOR, DOROTHY P. MESSERLY, FORNEY D. WINNER, AND MARY E. WINNER, THEIR HEIRS, EXECUTORS, ADMINISTRATOR AND ASSIGNS, AND ANY PERSONS KNOWN OR UNKNOWN CLAIMING ANY RIGHT, TITLE, LIEN OR INTEREST IN THE SUBJECT PREMISES THROUGH OR UNDER THEM,

PETITION OF: JOHN PURSLEY

No. 0082 M.D. Alloc. Dkt. 1999, No. 0083 M.D. Alloc. Dkt. 1999

SUPREME COURT OF PENNSYLVANIA

740 A.2d 234; 1999 Pa. LEXIS 1928

July 7, 1999, Decided

OPINIONBY: [*1]

OPINION: Petition for Allowance of Appeal from the Order of the Superior Court, ORDER, PER CURIAM:

AND NOW, this 7th day of July, 1999, the Petitions for Allowance of Appeal are hereby DENIED.

P. CALVIN ROBERTS, RUTH LAUBMIER, ROSALIE REGINA WILSON, ANNA ELEANOR LONG, DONALD MILTON KELIUS, FRANKLIN DAVID KELIUS, AND RAY KELIUS,

v.

ESTATE OF RUTH PURSLEY, MELLON BANK CENTRAL, N.A., EXECUTOR, DOROTHY P. MESSERLY, FORNEY D. WINNER, AND MARY E. WINNER, THEIR HEIRS, EXECUTORS, ADMINISTRATOR AND ASSIGNS, AND ANY PERSONS KNOWN OR UNKNOWN CLAIMING ANY RIGHT, TITLE, LIEN OR INTEREST IN THE SUBJECT PREMISES THROUGH OR UNDER THEM,

PETITION OF: CONSTANCE KEHOE, ADMINISTRATRIX FOR THE ESTATE OF DOROTHY F. MESSERLY

P. CALVIN ROBERTS, RUTH LAUBMIER, ROSALIE REGINA WILSON, ANNA ELEANOR LONG, DONALD MILTON KELIUS, FRANKLIN DAVID KELIUS, AND RAY KELIUS,

v.

ESTATE OF RUTH PURSLEY, MELLON BANK CENTRAL, N.A., EXECUTOR, DOROTHY P. MESSERLY, FORNEY D. WINNER, AND MARY E. WINNER, THEIR HEIRS, EXECUTORS, ADMINISTRATOR AND ASSIGNS, AND ANY PERSONS KNOWN OR UNKNOWN CLAIMING ANY RIGHT, TITLE, LIEN OR INTEREST IN THE SUBJECT PREMISES THROUGH OR UNDER THEM,

PETITION OF: JOHN PURSLEY

No. 0082 M.D. Alloc. Dkt. 1999, No. 0083 M.D. Alloc. Dkt. 1999

SUPREME COURT OF PENNSYLVANIA

1999 Pa. LEXIS 2545

August 23, 1999, Decided

PRIOR HISTORY: [*1] Original Opinion of October 16,

1998, Reported at: 1998 Pa. Super. LEXIS 2869.

OPINION: Application for Reconsideration, ORDER, PER CURIAM:

AND NOW, this 23rd day of August, 1999, the Applications for Reconsideration are hereby DENIED.

]. A37041/98

IN THE SUPERIOR COURT OF PENNSYLVANIA

CALVIN ROBERTS, et al.

VS.
ESTATE OF RUTH E. PURSLEY, et al.
APPEAL OF JOHN PURSLEY

Nos. 42 & 45 Harrisburg 1998

AND NOW, this 12th day of October, 1999, the appellant/ defendant's Petition for Ruling is DENIED; the appellee/ plaintiff's Petition for Sanctions is DENIED.

PER CURIAM

(SEAL)
TRUE COPY FROM RECORD
Attest: OCTOBER 13, 1999

/s/ Patricia A. Whitaker
Chief Clerk - Superior Court of Pa.
Middle District

IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

P. CALVIN ROBERTS, RUTH LAUBMIER, ROSALIE REGINA WILSON, ANNA ELEANOR LONG, DONALD MILTON KELIUS, FRANKLIN DAVID KELIUS AND RAY KELIUS

v.

ESTATE OF RUTH PURSLEY, MELLON BANK CENTRAL, N.A., EXECUTOR, DOROTHY P. MESSERLY, FORNEY D. WINNER AND MARY E. WINNER, THEIR HEIRS EXECUTORS, ADMINISTRATOR AND ASSIGNS, AND ANY PERSONS KNOWN OR UNKNOWN CLAIMING ANY RIGHT, TITLE, LIEN OR INTEREST IN THE SUBJECT PREMISES THROUGH OR UNDER THEM

Petition of John Ardell Pursley
No. 254 M.D. Misc. Dkt. 1999

ORDER
PER CURIAM:

AND NOW, this 13th day of April, 2000, the Petition for Allowance of Appeal, treated as a Petition for Review, as amended, is denied.

(SEAL)
TRUE & CORRECT COPY
ATTEST: APR - 13 2000

/s/ Shirley Bailey
SHIRLEY BAILEY
CHIEF CLERK

IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

P. CALVIN ROBERTS, RUTH LAUBMIER, ROSALIE REGINA WILSON, ANNA ELEANOR LONG, DONALD MILTON KELIUS, FRANKLIN DAVID KELIUS AND RAY KELIUS

v.

ESTATE OF RUTH PURSLEY, MELLON BANK CENTRAL, N.A., EXECUTOR, DOROTHY P. MESSERLY, FORNEY D. WINNER AND MARY E. WINNER, THEIR HEIRS EXECUTORS, ADMINISTRATOR AND ASSIGNS, AND ANY PERSONS KNOWN OR UNKNOWN CLAIMING ANY RIGHT, TITLE, LIEN OR INTEREST IN THE SUBJECT PREMISES THROUGH OR UNDER THEM

Petition of John Ardell Pursley
No. 254 M.D. Misc. Dkt. 1999

ORDER
PER CURIAM:

AND NOW, this 1st day of August, 2000, the Petition for Reconsideration and the respondents' request for attorney fees are denied.

(SEAL)
TRUE & CORRECT COPY
ATTEST: AUG - 2 2000
/s/ Shirley Bailey
SHIRLEY BAILEY
CHIEF CLERK

TITLE 21. DEEDS AND MORTGAGES
PENNSYLVANIA STATUTES
CHAPTER 1. DEEDS AND GENERAL PROVISIONS
REGISTRATION AND RECORDING
TIME OF RECORDING

21 P.S. § 444 (1999) 1775, Mar 18, 1 SmL 422 § 1

[P.S.] § 444. All deeds made in the state to be acknowledged and recorded within ninety days

All deeds and conveyances, which, from and after the passage of this act, shall be made and executed within this commonwealth of or concerning any lands, tenements or hereditaments in this commonwealth, or whereby the title to the same may be in any way affected in law or equity, shall be acknowledged by the grantor, or grantors, bargainor or bargainors, or proved by one or more of the subscribing witnesses thereto, before one of the judges of the supreme court, or before one of the judges of the court of common pleas, or recorder of deeds, prothonotary, or clerk of any court of record, justice of the peace, or notary public of the county wherein said conveyed lands lie, and shall be recorded in the office for the recording of deeds where such lands, tenements or hereditaments are lying and being, within ninety days after the execution of such deeds or conveyance, and every such deed and conveyance that shall at any time after the passage of this act be made and executed in this commonwealth, and which shall not be proved and recorded as aforesaid, shall be adjudged fraudulent and void against any subsequent purchaser or mortgagee for a valid consideration, or any creditor of the grantor or bargainor in said deed of conveyance, and all deeds or conveyances that may have been made and executed prior to the passage of this act, having been duly proved and acknowledged as now directed by law, which shall not be recorded in the office for recording of deeds in the county where said lands and tenements and hereditaments are lying and being, within ninety days after the date of the passage of this act, shall be adjudged fraudulent and void as to any subsequent purchaser for a valid consideration, or mortgagee, or creditor of the grantor, or bargainor therein.

TITLE 21. DEEDS AND MORTGAGES
PENNSYLVANIA STATUTES
CHAPTER 1. DEEDS AND GENERAL PROVISIONS
REGISTRATION AND RECORDING
NECESSITY OF RECORDING AND COMPULSORY RECORDING

21 P.S. § 351 (1999) 1925, May 12 PL 613 § 1; 1931, June 12 PL 558 No. 191 § 1

[P.S.] § 351. Failure to record conveyance

All deeds, conveyances, contracts, and other instruments of writing wherein it shall be the intention of the parties executing the same to grant, bargain, sell, and convey any lands, tenements, or hereditaments situate in this Commonwealth, upon being acknowledged by the parties executing the same or proved in the manner provided by the laws of this Commonwealth, shall be recorded in the office for the recording of deeds in the county where such lands, tenements, and hereditaments are situate. Every such deed, conveyance, contract, or other instrument of writing which shall not be acknowledged or proved and recorded, as aforesaid, shall be adjudged fraudulent and void as to any subsequent bona fide purchaser or mortgagee or holder of any judgment, duly entered in the prothonotary's office of the county in which the lands, tenements, or hereditaments are situate, without actual or constructive notice unless such deed, conveyance, contract, or instrument of writing shall be recorded, as aforesaid, before the recording of the deed or conveyance or the entry of the judgment under which such subsequent purchaser, mortgagee, or judgment creditor shall claim. Nothing contained in this act shall be construed to repeal or modify any law providing for the lien of purchase money mortgages.

1804 The Statutes at Large of Pennsylvania. v. 17, p. 877

CHAPTER MMDXXIV
AN ACT DIRECTING THE MODE OF SELLING UNSEATED LANDS FOR TAXES.

Section I. (Section I, P. L.) Be it enacted by the Senate and House of Representatives of the Commonwealth of Pennsylvania, in General Assembly met, and it is hereby enacted by the authority of the same, That in order to furnish the commissioners of the several counties within this commonwealth with information necessary for levying and collecting the several taxes which by law they are or may be directed and required to levy and collect, it shall be the duty of the deputy-surveyors of the several counties aforesaid, at any time upon the application of the said commissioners to make out (on oath or affirmation) a correct return to them of all the lands surveyed within their respective counties, whereof as deputy-surveyors they may have drafts, maps or plates, made by themselves or their predecessors in office, and of all the warrants or orders of survey to them directed, and not yet executed, or of such of them as the said commissioners may require, which returns shall include a list of the number of acres contained in each survey or warrant, and of the names and surnames of the original warrantees, the waters on which the same is situate, the land contiguous thereto, and the township, if known, wherein the same may lie; for which returns the said deputy-surveyors shall receive from the county treasurer, on the order of the commissioners, four cents for each warrant or survey thus returned to the said commissioners; and every deputy-surveyor, who, when required, shall refuse or neglect to make such return, shall forfeit and pay for every such neglect or refusal one hundred dollars, to be recovered as other debts of equal amount are or may be by law recoverable; and the said county commissioners are hereby enjoined and required to provide and keep a suitable book or books, in which they shall cause to be entered the number of acres surveyed, the name of the original owner and bound

aries, so far as it shall be known to them, of each tract mentioned in every such return which they have already received or may hereafter receive from any of the deputy-surveyors aforesaid.

Section II. (Section II, P. L.) And be it further enacted by the authority aforesaid, That all unseated lands within this commonwealth, held by individuals, companies or bodies corporate, either by improvement, warrant, patent or otherwise, shall, for the purpose of raising county rates and levies, be valued and assessed in the same manner as other property; but the collection of taxes already laid, or that may hereafter be laid or assessed, on unseated lands, shall not be enforced by sale of such lands, until after the expiration of twelve months from and after the same shall have been assessed, and until notice be given by the commissioners of the proper county, for four weeks, in three of the daily newspapers of the city of Philadelphia, and in one other newspaper in or nearest to the county where such lands lie, that one or more than one year's tax is due upon the unseated lands within such county; and if any tax now due or that may hereafter become due as aforesaid, together with the costs necessarily accrued thereon, shall, for the space of three months after such notice shall have been given, remain unpaid, then, in every such case, the said county commissioners shall issue their warrants, under their hands and seal of office directed to the sheriff or coroner of the proper county, commanding him, after having given within his proper county, at least thirty days notice in one newspaper printed in such county, or if there be no newspaper printed in the county, then one printed nearest thereto, and by written or printed advertisements set up in at least three public places, one of which shall be at the court-house in said county, stating that the sale of unseated lands for arrearages of taxes will commence on a certain day, to make public sale of the whole or any part of such tracts of unseated lands as he may find necessary for the payment of the taxes due thereon, respectively, and of all costs necessarily accrued thereon, by reason of such delinquency, and

to make and execute a deed or deeds, in fee simple, to the purchaser or purchasers of any unseated lands so sold, and the same in open court of common pleas of the proper county, duly to acknowledge; it shall also be the duty of said sheriff or coroner, to take from such purchaser or purchasers, bonds in his own name, with warrants of attorney annexed, for any surplus money that may remain after satisfying and paying the taxes and costs aforesaid, and the same bonds forthwith to file in the office of the prothonotary of the proper county, together with at least one attested copy of the advertisements, which shall so as aforesaid by him have been set up.

Section III. (Section III, P. L.) And be it further enacted by the authority aforesaid, That it shall be the duty of the said county commissioners to file in the prothonotary's office aforesaid, one at least of each of the newspapers in which they shall have published their general notice; which newspaper, so filed, together with the affidavit of at least one of the printers, that the aforesaid notice was published in the usual number of his papers, and the advertisement of the sheriff or coroner, filed as aforesaid, shall at all times there after, in any trial or law or in equity, respecting the validity of sales made by virtue of this act, be deemed and taken as sufficient evidence of legal notice having been given of the sales hereby directed to be made; and no action for recovery of said lands shall lie, unless the same be bought within five years after the sale thereof, for taxes as aforesaid: Provided always, that where the owner or owners of such lands sold as aforesaid, shall at the time of such sale be minor or minors, insane, and residing within the United States, five years after such disability is removed, shall be allowed such person or persons, their heirs or legal representatives, to bring their suit or action for recovery of the lands so sold; but where the recovery is effected, in such cases the value of the improvements made on the lands so sold, after the sale thereof, shall be ascertained by the jury trying the action for recovery, and paid by the person or persons recovering the same, before he, she or they shall obtain possession

of the lands so recovered.

Section IV. (Section IV, P. L.) And be it further enacted by the authority aforesaid, That the bonds taken by the sheriff or coroner, for surplus monies, and filed as aforesaid, shall, from the date of the deed executed by him as aforesaid, bind as effectually and in like manner as Judgments, the lands by him sold, into whose hands or possession soever they may come; and the owners of said lands, at the time of sale, or their heirs, assigns or other legal representatives, may, at any time within five years after such sales, cause actions to be entered on the docket of the said prothonotary, in the name of the sheriff or coroner, for the use of the said owners, their heirs or assigns, or other legal representatives; and if the monies mentioned or contained in such bonds, together with legal interest from the time it is demanded, be not paid within three months after such entry, execution shall issue forth with for the recovery of the same.

Section V. (Section V, P. L.) And be it further enacted by the authority aforesaid, That sales of unseated lands, for taxes that are now due, or that may hereafter become due thereon, made agreeably to the directions of this act:, shall be in law and equity valid and effectual to all intents and purposes, to vest in the purchaser or purchasers of lands sold as aforesaid, all the estate and interest therein, that the real owner or owners thereof had at the time of such sale, although the land may not have been taxed or sold in the name of the real owner thereof.

Section VI. (Section VI, P. L.) And be it further enacted by the authority aforesaid, That every tenant who may or shall occupy or possess any lands or tenements, shall be liable to pay all the taxes which during such occupancy or possession may thereon become due and payable; and having so paid such taxes, or any part thereof, it shall be lawful for him, by action of debt or otherwise, to recover said taxes from his landlord, or, at his election, to defalcate the amount thereof in the payment of the rent due to such landlord,

unless such defalcation or recovery would impair any contract or agreement between them previously made.

Section VII. (Section VII, P. L.) And be it further enacted by-the authority aforesaid, That the twenty-fifth section of the act for raising county rates and levies, passed the eleventh day of April one thousand seven thousand and ninety-nine, (1) and so much of any other act of assembly as is hereby altered or supplied, be and they are hereby repealed; but nothing in this act contained shall be construed to impair or in any wise affect the act, entitled "An act prohibiting the commissioners of the respective counties of this commonwealth from selling, for a limited time, unseated lands for taxes," passed the eighth day of February in the present year. (2)

Approved April 3, 1804. Recorded in L. B. No. 10, p. 37.

Note (1). Chapter 2095; Statutes at Large, p. 375.

Note (2). Chapter 2427. Supra, this volume, p. 566.

1806 The Statutes at Large of Pennsylvania, v. 18, p. 294

CHAPTER MMDCCXXI.
A SUPPLEMENT TO THE ACT, ENTITLED "AN ACT ENJOINING CERTAIN DUTIES ON THE HOLDERS OF WARRANTS NOT EXECUTED, AND ON THE HOLDERS OF UNSEATED LANDS." (1)

Section I. (Section I, P. L.) Be it enacted by the Senate and House of Representatives of the Commonwealth of Pennsylvania, in General Assembly met, and it is hereby enacted by the authority of the same, That it shall be the duty of every holder of unseated lands within this commonwealth, who has not complied with the injunctions required by the second section of the act to which this is a supplement, to

furnish to the commissioners of the proper county, on or be fore the fourth Monday of November next, a statement signed by such holder or his, her or their agent, containing a description of each and every tract so held, the name of the person or persons to whom the original title from the commonwealth passed, and the nature, number and date of such original title; and it shall be the duty of every person hereafter be coming a holder of unseated lands by gift, grant or other conveyance to furnish a like statement, together with the date of the conveyance to such holder, and the name of the grantor, within one year, from and after such conveyance; and on failure of any holder of unseated lands to comply with the injunctions of this act, it shall be the duty of the county commissioners to assess on every tract of land, respecting which such default shall be made, when discovered, four times the amount of the tax to which such tract or tracts of land would have been otherwise liable, and to enforce the collection thereof, in the same manner that taxes due on unseated lands are or may be assessed and collected: Provided, that nothing in this act nor in the act (1) to which this is a supplement, shall be construed as giving greater validity to unexecuted land warrants, than they are now entitled to, nor to the detriment of persons under legal disabilities: Provided, such person or persons comply with the foregoing requisitions within the time or times limited respectively, after such disability shall be removed.

Section II. (Section II, P. L.) And be it further enacted by the authority aforesaid, That the second section of the act, entitled "An act enjoining certain duties on the holders of land warrants not executed, and on the holders of unseated lands," (1) be, and the same is hereby repealed.

Approved March 28, 1806. Recorded in L. B. No. 10, p. 391.

Note (1) Chapter 2602; 17 Statutes at Large, p. 1049,

1809 The Statutes at Large of Pennsylvania, v. 18, p. 1170

CHAPTER MMMCXXVIII.

AN ACT TO ALTER AND AMEND AN ACT ENTITLED "AN ACT DIRECTING THE MODE OF SELLING UNSEATED LAND FOR TAXES." (l)

Section I. (Section I, P. L.) Be it enacted by the Senate and House of Representatives of the Commonwealth of Pennsylvania, in General Assembly met, and it is hereby enacted by the authority of the same, That from and after the first day of September next, the several powers vested in and duties enjoined on the respective sheriffs, by the act to which this is a supplement, shall be transferred to and performed by the county treasurers respectively, under the same obligations and restrictions to which the said sheriffs are by law subjected, and the sales to be by them made in consequence of the transfer aforesaid, shall be as valid in law as sales made by the sheriffs aforesaid, and so much of any law as is hereby altered or supplied, be and the same is hereby repealed.

Section II. (Section II, P. L.) And be it further enacted by the authority aforesaid, That the fees to be received by the respective county treasurers for the services aforesaid, other than the expense of advertising, shall be as follows: to wit,

For selling every tract of land or part thereof, as the case may require, twenty-five cents.

For writing and signing every deed, one dollar and fifty cents.

For acknowledging every deed, twenty-five cents.

For writing and filing every bond to secure the purchase money, twenty-five cents.

Approved April 4, 1809. Recorded in L. B. No. 11, p. 392.

Note (1). Chapter 2624; 17 Statutes at Large, p. 877.

1815. Dunlop, James, The General Laws of Pennsylvania from the Year 1700, to April 22, 1846, Chronologically Arranged, T. & J.W. Johnson, Law Booksellers, Phila. 1847.

CHAPTER CCX. AN ACT TO AMEND THE ACT ENTITLED "AN ACT DIRECTING THE MODE OF SELLING UNSEATED LANDS FOR TAXES, AND FOR OTHER PURPOSES."

I. The treasurers of the several counties in this commonwealth, shall be, and they are hereby respectively authorized and directed, to commence on the second Monday in June, in the year one thousand eight hundred and sixteen, and at the expiration of every twos years thereafter, and adjourn from day to day, if it shall be found necessary so to do, and make public sale of the whole or any part of such tracts of unseated lands, situate in the proper county, as will pay the arrearages of the taxes, any part of which shall then have remained due and unpaid for the space of one year before, together with all costs necessarily accruing by reason of such delinquency, and to make and execute a deed or deeds, in fee simple, in the manner directed by the acts to which this is a further supplement; and it shall be the duty of the said county treasurer, to give at least sixty days notice of the time and place of such sales, the township or townships in which the said tracts of land are respectively situated, the number of acres contained in each tract, and the names of the warrantees or owners thereof, and the sums due upon each tract for taxes at least four times in one daily newspaper in the city of Philadelphia, and in one other newspaper in or nearest to the county where such lands lie, under the penalty of fifty dollars, in each and every case, to be recovered by the owner or owners of the land sold as afore

said, as debts of like amount are by law recoverable, but the neglect of such treasurer to cause the said publications to be made, shall not, in any case, invalidate any sale made in pursuance of the provisions of this act.

II. From and after the passing of this act, when any treasurer who shall have made sale of unseated lands as aforesaid, shall die or be removed from office, before any deed or deeds are executed by him to the purchaser or purchasers, then, and in every such case, it shall be the duty of the treasurer for the time being, to perfect such title and to execute a deed or deeds to the purchaser or purchasers, and they are hereby empowered and required, upon the full discharge and payment of the money or price for which the said lands were sold, with such costs and charges as remain unpaid to the former treasurer, to make, execute and acknowledge any deed or deeds and to perform and do all other matters and things that by the former treasurer might, could or ought to have been performed or done, which, when done, shall be held and adjudged as effectual in law as if the title had been completed by the former treasurer.

III. It shall be the duty of the purchasers at treasurers sales as soon as any deed or deeds shall have been tendered, after the deeds are acknowledged in the court of common pleas of the proper county, by the treasurer who made the sale, or his successor, as the case may be, to pay to the treasurer the amount of the purchase money, or such part thereof as shall be necessary to pay off the taxes and costs and also to pay, in addition, the sum of one dollar for the use of the prothonotary for entering the acknowledgment of the deed; and in case the amount is not forthwith paid, it is hereby declared to be the duty of the treasurer to bring an actions of debt, in the name of the proper county, for the same, in such courts as debts of equal amount are by law recoverable, and when judgment is obtained there shall be no stay of execution, nor shall it be competent for the defendant in such suit, to give in evidence, any irregularity in the assessments or proceedings of the commissioners or treasurer,

touching any sale made in pursuance of this act.

IV. If the owner or owners of lands sold as aforesaid shall make, or cause to he made. within two years after such sale. an offer of legal tender of the amount of the taxes for which the said lands were sold and the costs, together with the additional sum of twenty-five per cent. on the same, g to the county treasurer, who is hereby authorized and required to receive n and receipt for the same, and to pay it over to the said purchaser upon r demand, and if it shall be refused by the said treasurer, or in case the owner or owners of lands so sold, shall have paid the taxes due on them, previously to the sale, then, and in either of these cases, said owner or owners shall be entitled to recover the same by due course of law, but in no other case and on no other plea, shall an action be sustained, and it is hereby declared that so much of the act to which this is a supplement, as requires notice of the taxes being due and sale thereon, to be given in certain public newspapers, is repealed, and that no alleged irregularity in the assessment, or in the process or otherwise, shall be construed or taken to affect the title of the purchaser, but the same shall be declared to be good and legal: Provided, That where the owner or owners of land sold as aforesaid, shall at the time of such sale, be an orphan ors orphans, or insane, and residing within the United States, two years after such disability is removed, shall be allowed such person or persons, their heirs or legal representatives, to bring their suit or action for recovery of the lands so sold, but where the recovery is effected in such cases, the value of the improvements made on the land so sold, after the sale thereof, shall be ascertained by the jury trying the action for recovery, and paid by the person or persons recovering the same, before he, she or they shall obtain possession of the lands so recovered.

V. If any tract of unseated land, hereafter to be sold for taxes due at this time, or which shall hereafter be imposed, shall not have bidden for it] a sum equal to the whole amount of taxes for which it shall have been advertised and the costs

accrued, then, and in that case, it shall be the duty of the commissioners of the proper county or any one of them, to bid off the same, and a deed shall thereupon be made by the treasurer to the commissioners for the time being, and to their successors in office, to and for the use of the proper county, and it shall be the duty of the commissioners to provide a book, wherein shall be entered the name of the person as whose estate the same shall have been sold, the quantity of land, and the amount of taxes it was sold for, and every such tract of land shall not there. after, so long as the same shall remain the property of the county, be charged in the duplicate of the proper collector; but for five years next following such sale, if it shall so long remain unredeemed, the commissioners shall, in separate columns in the same book, charge every such tract of land with reasonable county and road tax, according to the quality of the said land, not exceeding in any case the sum of six dollars for every hundred acres.

VI. The right of redemption shall remain in the real owner of such land r for five years after such sale, and on paying the treasurer of the county all the taxes and costs due thereon at the time of sale, and interest therefor for the same time, and also the taxes which shall have been assessed thereon from year to year after the sale, and interest of each assessment to be counted from the time it ought to have been paid, and on the production of the treasurer's receipt, the commissioners shall, by deed polls endorsed on the back of the treasurer's deed to them, convey to the person who shall have been the owner of the land at the time Of sale, or his legal representative, all the right and title which the county may have acquired under such sale as aforesaid; the monies so received for road taxes shall be paid to the supervisors of the roads of the township within which such lands shall lie on orders to be drawn by the commissioners on the treasurer, to be applied by them in making and repairing the roads and highways in their respective townships.

VII. If the owner of any such land shall not redeem the same within the period aforesaid, it shall thereafter be lawful for the commissioners to sell any such land, by public sale, and make a deed therefor to the purchaser,-which shall be available in law, as well against the county as against the person or persons as whose estate the same had been sold, but no tract shall be sold for a sum less than the amount of taxes, cost and interest, which shall be due at the time of such sale by the commissioners, and such land shall thereafter be charged by the township assessors in the name of such last purchaser or redeemer, as other lands of equal value may be charged, and shall again be liable to be assessed and sold for taxes, agreeably to this act and the act to which this is a supplement.

VIII. Any board of commissioners may direct the treasurer of the pro per county to receive in advance, for any term not exceeding six years, a sum which in their estimation shall be equal to the taxes that ought to be imposed on any such land or lands, during the period for which they shall so compound with the owner as aforesaid.

IX. The form of the deed required by this act to be executed by the treasurer to the commissioners, may be in the following words, viz. "Whereas, a tract of unseated land containing _____ acres, situate _____ township, in the county of _____ surveyed to _____ hath been rated and assessed with divers taxes, to wit, county taxes _____ dollars, and road taxes _____ dollars, which remain unpaid, and the treasurer having offered the same for sale, agreeably to law, and no person bidding therefor a sum equal to the amount of taxes due, and the costs of advertising and sale, it therefore became the duty of the commissioners to buy the same, which they have accordingly done on the _____ day of _____ last past, for the sum of _____ dollars. Now, this indenture witnesseth, that I, _____ treasurer of said county, do, for and in consideration of the

said sum, grant, bargain and sell the said tract of land to _____ commissioners of said county, to hold to them and their successors in Office forever, subject to the redemption allowed by law. In witness whereof, I have hereunto set my hand and seal, the _____ day of _____

Sealed and delivered in)
the presence of) [SEAL]

Acknowledged by the grantor before _____ one of the justices of the peace of the county of _____

Witness the hand and seal of said justice, the _____ day of _____, 18__

[SEAL]"

All which sales to the commissioners, shall be entered by their clerk in their book of minutes, as well as any redemption which may happen, and sales by them after the right to redeem is passed over.

X. [Obsolete.]

XI. Such parts of the act to which this is a supplement, and so much of any other act of assembly, as are altered or supplied by this act, be, and the same are hereby repealed.

Passed 13th March. 1815, 6 Smith's Laws 299

1846. Laws of Pennsylvania

No. 100.

A SUPPLEMENT

To existing laws in relation to recording of deeds.

SECTION 1. Be it enacted by the Senate and House of Representatives of the Commonwealth of Pennsylvania in General Assembly met, and it is hereby enacted by the authority of the same, That all patents granted by the commonwealth, and all deeds of sheriffs, coroners, marshals and treasurers; and all deeds made in pursuance of a decree of any court being duly acknowledged, may be recorded in the office for recording deeds in the county where the lands lie, and the records thereof, or duly certified copies thereof, shall be evidence in all cases where the original deeds or patents would be evidence; and where any of the deeds aforesaid, have heretofore been recorded in the office for recording deeds in the county where the lands lie, or in the office of the prothonotaries of the several courts of the city and county of Philadelphia, the records thereof or duly certified copies thereof, shall be as good evidence as if the same had been recorded under the provisions of this act.

FINDLEY PATTERSON,
Speaker of the House of Representatives.

DANIEL L. SHERWOOD,
Speaker of the Senate.

APPROVED - The fourteenth day of March, one thousand eight hundred and forty-six.

FRS. S. SHUNK.

Re: PURDON'S Pennsylvania Statutes Annotated - Permanent Edition - Title 21. Deeds and Mortgages: "The text of

the law is complete to April 1, 1955, . . ." With respect to Purdon's Annotations for Title 21 P.S. 385 regarding the filing of Treasurer's Deeds with the Recorder of Deeds Office:

(note 2) "this section merely authorizes the recording of the deed in the recorder's office, and does not require it; and the entry in the prothonotary's office is sufficient. Goodman v. Sanger; 91 Pa. 71; 1879; Foulke v. Millard, 108 Pa. 230, 1885; affirming 13 W.N.C. 95, 16 Phila. 140, 40 L.I. 160. This section does not make the record notice of the sale; . . ." (note 4): "Prior to this section there was no statute authorizing the recording of a treasurer's deed in the office for the recording of deeds; the record entry in the prothonotary's office was held to be a sufficient recording. and a certified copy from the recorders office was not admissible in evidence. . . ."

Furthermore, James Dunlap's work, A Book of Forms: Conveyancing; Pennsylvania, etc., Kay and Brother, Philadelphia, (4th ed., 1866), first copyrighted the very year of the Treasurer's sale to Devling, 1854, contains the following directive to title searchers (p. 905): "taxes and district claims being a lien in whatsoever name assessed, a search against the true owner may not always be sufficient, and a search against the lot by whomsoever owned is necessary, to be absolutely certain that no lien exists. Claypole v. Dorsey, Wh. Supl. 411; 11 Pa. L.J. 564".

TITLE 72. TAXATION AND FISCAL AFFAIRS
PENNSYLVANIA STATUTES
CHAPTER 4. LOCAL TAXATION
ENFORCEMENT OF COLLECTION
PAYMENT AND COLLECTION OF TAXES ON UNSEATED LANDS
RECEIPTS, RECORDS, BOOKS, ETC.

72 P.S. § 5811 (1999) 1879, Apr. 30 PL 34 § 1

[P.S.] § 5811. Record of payment of taxes

In all cases where taxes upon unseated lands are paid to a county treasurer by the owners or claimants of said lands, it shall be the duty of such treasurer to enter such payments upon the proper book kept by him, for the purpose, and if requested by the person paying such taxes, give a certified copy, under the official seal of said county treasurer, of the entries in such book, specifying the name of the person or persons as whose property such lands are taxed, the location of such lands, the number of the warrant, and the number of acres or other description thereof, the kind and amount of taxes assessed thereon and so paid, the date of payment of the same, and the name of the person or persons paying the said taxes and for whose use the same are paid: Provided, That the said treasurer shall be entitled to receive therefor, from the person demanding the said receipt or certified copy, the sum of twenty-five cents.

Raising a Federal Issue Rule14.1 (g)(i) Excerpts

JUDGES CHAMBERS
TWENTY-FIFTH JUDICIAL DISTRICT OF PENNSYLVANIA
LOCK HAVEN, PENNSYLVANIA 17745

J MICHAEL WILLIAMSON
JUDGE

717-893-4014
FAX 717-893-4145

M E M O

To: Charles R. Rosamilia, Jr., Esquire
Scott T. Williams, Esquire

From: Judge J. Michael Williamson /initialed/

Re: Roberts v. Pursley

Date: October 8, 1997

The Court would appreciate receiving a memorandum from each of you prior to October 15, 1997, addressing the following issues:

a. The effect of Defendants' failure to record their Deeds.
b. Plaintiffs' ability to acquire title by adverse possession.

Trial Court requested Brief of Kehoe

IN THE COURT OF COMMON PLEAS OF CLINTON COUNTY, PENNSYLVANIA

P. CALVIN ROBERTS, RUTH LAUBMIER, ROSALIE REGINA WILSON, ANN ELEANOR LONG, DONALD MILTON KELIUS, FRANKLIN DAVID KELIUS, and : RAY KELIUS, Plaintiffs

ESTATE OF RUTH PURSLEY, MELLON BANK CENTRAL, N.A., Executor, DOROTHY P. MESSERLY, FORNEY D. WINNER, and MARY E. WINNER, Defendants

No.: 432-92

CIVIL ACTION - LAW

BRIEF OF CONSTANCE KEHOE, EXECUTRIX OF ESTATE OF DOROTHY P. MESSERLY
[Service: Oct. 15, 1997]

Excerpt:

(Initially, it must be observed that nowhere in the pleadings has Kelius raised the equitable argument of bona fide purchaser. As such, the issue is not before the court and Pursley has not addressed it in pleadings nor in their presentation of their case. Pursley contends that consideration of this issue at this time is improper and highly prejudicial and is otherwise violative of Pursley's due process rights.)

Excerpt:

(Nowhere in the pleadings has Kelius raised the issue of adverse possession. Therefore, the issue is not before the Court and Pursley has not addressed the issue in their pleadings nor in their presentation at trial for that reason. Consideration of the issue at this time is contrary to the rules of civil procedure and is otherwise improper and highly prejudicial and constitutes a violation of Pursley's constitutional right to due process.)

Excerpt:

IV. CONCLUSION:

Even if the Court could consider the issues of bona fide purchaser and adverse possession without violating the rules of civil procedure, the case law and Pursley's constitutional due process rights, for the reasons set forth above Kelius is not a bona fide purchaser of the land at issue and has not obtained title to the same by adverse possession.

Respectfully submitted,

/s/ Scott Thayden Williams
Scott Thayden Williams-ID#32490
429 Market Street
Williamsport, PA 17701
(717) 323-8506

Roberts at al. Court requested post Ejectment Trial brief of Oct. 15, 1997. (see App. 67 for request)

The question of a '60 year search' practice never arose in the case until Roberts at al. submitted their Court requested post Ejectment Trial brief, filed Oct. 15, 1997, wherein at page 5 they state:

> "The title search that they would have completed at their time of purchase in 1964 would have had to go back to a warranty deed at least 60 years prior to their date of purchase. . . . . The court is urged to think of what a decision in favor of the defendants Pursley does to title search standards in Clinton County and in fact the entire Commonwealth of Pennsylvania. All practicing attorneys use the sixty (60) year standard for title searches and allow defects in title prior to sixty (60) years from the date of purchase to be the basis for an ejectment action or other claim of title is to open the door to land raiders to come into counties and try to find ancient flaws of title and to file claims on those parcels for title defects that would not have been disclosed by sixty (60) year Title searches of the premises. This would be unsettling to the entire real estate market and practices which have existed for apparently centuries in the Commonwealth of Pennsylvania."

However, all Keating intra-family partnership deeds after 1802, through which Roberts et al. claim, contain an omnibus exception; the wording of that exception in the 1884

Keating to Hamlin deed makes manifest that the Keatings had been in the land business, and that they had no intention of conveying what they had already parted with:

> "Also all title papers, notes of survey, fixtures, maps and books pertaining to the same and to the business thereof: Excepting and Reserving thereout each part and parcels as have been conveyed to settlers and purchasers of tracts and parcels of the same by deeds of the parties of the first part hereto and of their predecessors in the title who are named in the preamble hereof (but this exception and reservation do not relate to or embrace any of the lands conveyed in the Deeds enumerated in the said preamble). This conveyance is made subject to all such agreements as have heretofore, by them the parties of the first part and those from whom they derived their title, been made with actual or intended settlers or others, respecting the purchase or allotment of any part or parcel of said lands."

Note that 'Deeds enumerated in the said preamble' are the earlier intra-family partnership conveyances of residual acreage.

IN THE COURT OF COMMON PLEAS OF CLINTON COUNTY, PENNSYLVANIA
CIVIL ACTION - LAW
NO. 432 - 92 (CIVIL)
MOTION FOR RECONSIDERATION OF DECREE
[Docketed: Nov. 17, 1997]

AND NOW, comes John Ardell Pursley, Pro Se, joint owner of the subject property and requests your Honorable Court to reconsider your Decree of November 7, 1997, for judgment in favor of the Plaintiffs based solely upon the Pennsylvania Recording Act for the following reasons:

Excerpt:
7, SIXTY YEAR TITLE SEARCH

There is neither Pennsylvania statute nor precedent justifying the sixty-year limit on title search. The Clinton County practice of limiting title searches to sixty years is entirely arbitrary and adjudication by this standard would permit the bar to usurp the legislature's authority to promulgate the law. The Court has ignored the Plaintiffs' documented title chain for two centuries between 1792 and 1992, which obviously exceeded the sixty year limit, including the fraudulent 1901 deed and prior deeds containing the omnibus exception which was notice that other parties had undefined equitable interests in the same land prior to the 1901 deed. . . . .

IN THE COURT OF COMMON PLEAS OF CLINTON COUNTY, PENNSYLVANIA

P. CALVIN ROBERTS, RUTH LAUBMIER, ROSALIE REG1NA WILSON, ANN ELEANOR LONG, DONALD MILTON KELIUS, FRANKLIN DAVID KELIUS, and RAY KELIUS, Plaintiffs

vs.

ESTATE OF RUTH PURSLEY, MELLON BANK CENTRAL, N.A., Executor, DOROTHY P. MESSERLY, FORNEY D. WINNER, and MARY E. WINNER, Defendants

No.: 432-92

CIVIL ACTION - LAW

MOTION FOR RECONSIDERATION
[Service: Nov. 17, 1997]

AND NOW, comes Constance Kehoe, Executrix for the Estate of Dorothy P. Messerly and files this Request for Reconsideration of the Decree of November 6, 1997 as follows:

1. The Court has determined that Kelius acquired title to the subject premises under the Pennsylvania Recording Statute (21 P.S. §351).

2. Movant requests that this Honorable Court reconsider this determination for the following reasons:

(a) The bona fide purchaser argument was not raised in the pleadings nor was there any motion to amend the pleadings at the time of trial. Therefore, the issue was not properly before the court and Pursley was not given the opportunity to present testimony regarding the same at the time of trial. . . .

IN THE COURT OF COMMON PLEAS OF CLINTON COUNTY, PENNSYLVANIA

P. CALVIN ROBERTS, RUTH LAUBMIER, ROSALIE REG1NA WILSON, ANN ELEANOR LONG,: DONALD MILTON KELIUS, FRANKLIN DAVID KELIUS, and RAY KELIUS, Plaintiffs

vs.

ESTATE OF RUTH PURSLEY, MELLON BANK CENTRAL, N.A., Executor, DOROTHY P. MESSERLY, FORNEY D. WINNER, and MARY E. WINNER, Defendants

No.: 432-92

CIVIL ACTION - LAW

CONSTANCE KEHOE BRIEF IN SUPPORT OF MOTION FOR RECONSIDERATION
[Service: Nov. 17, 1997]

I. Facts:

The Court is well aware of the facts of this case and has adequately set them forth in discussion which is the subject to this Brief.

II. Issues:

a) WHETHER THE COURT CORRECTLY APPLED THE BONA FIDE PURCHASER DOCTRINE AND PENNSYLVANIA RECORDING STATUTE.

III. Argument:

a) THIS HONORABLE COURT HAS NOT CORRECTLY APPLED A BONA FIDE PURCHASER DOCTRINE AND PENNSYLVANIA RECORDING STATUTE TO THE FACTS OF THIS CASE.

Excerpt:

The Pleadings in this case indicate that neither the bona fide purchaser argument nor the recording statute argument were raised by pleading or otherwise. As such, the issue was not before the Court and Pursley did not address the potential defense with evidence at time of hearing. Pursley recognizes, however, the Courts attempt to give thoughtful consideration to all issues that may have arisen during this proceeding as will be addressed below. Nevertheless, Pursley does contend the Kelius's failure to raise these issues constitutes a waiver of said issues and, therefore, it would be inappropriate to address them in this decision.

John A. Pursley's Civil Docketing Statement of questions and issues to be presented on Appeal. [Signed for delivery to Court: Jan. 20, 1998]

SUPERIOR COURT OF PENNSYLVANIA
CIVIL DOCKETING STATEMENT
Docket No. 000045HBG98

2. Issues to be raised on appeal:

Key Words: fraud; tax sale; official deed; absolute title; divestment; bona fide purchaser; common grantor; constructive notice; judicial notice; maximal sixty-year title search.

1, Possession of title to subject property.
2, Was the 1901 deed from Hamlin to Shade fraudulent?
3, Does the passage of time cure the criminal act of forging a deed?
4, Does a fraudulent deed pass good title?
5, Is the custom in Clinton County of limiting title search to sixty years the law of the land?
6, Is court acknowledgment of tax sales "constructive notice" as duly recorded in the "Treasurer's Acknowledgment of Deeds in Open Court"?
7, Is the record of a treasurer's sale in the Prothonotary's Book of Acknowledgments of Treasurer's Deeds officially acknowledged when the trial court takes "judicial notice of the court's own records"?
8, Who, if anybody, was the common grantor in this dispute?
9, Can a common grantor, other than the county, be derived from an "Official" treasurer's or commissioners' tax sale?
10, Do unchallenged treasurer's and commissioners' county tax sales of unseated lands pass absolute title to purchaser after the redemption term has expired?
11, Is 21 Pa.S.C. Section 351 retroactive to "Official" treasurer's and commissioners' deeds executed before May 12, 1925?
12, Can title derived from either a treasurer's or commissioners' deed be divested through challenge by a party claiming to be a bona fide purchaser but in a different title trail?
13, Can a common grantor, or bona fide purchaser, be derived from an independent competing title chain which has been derived from a fraudulent deed?

1782 Schrider vs. Nargan; 1 Dall. 68; 1782

"It was objected to by Lewis and Clymer, that a sheriff's deed of sale of lands, under a writ of venditoni exponas, not being recorded in the Rolls Office, according to the act of assembly of 1774, could not be read in evidence. Sed non allocatur: Because it was acknowledged [*69] in court, and the registering of it in the prothonotary's office (as is always done) is a sufficient recording within the act." McKean, C.J

NOTE: The Penn Proprietaries' Rolls Office and the Philadelphia County recorder of deeds office functioned together in the same place for many years; the Recording Act of 1775 Mar 18; 1 Sm.L. 422 was passed during the General Assembly session of 1774 / 75.

1839 Naglee v. Albright; 4 Whar. 291; 1839; 297 - 298

"The opinion of the court was delivered by Sergeant, J.
1. It is insisted that the court ought to have instructed the jury, that the sheriff's deed not being recorded in the office for the recording of deeds, is void and insufficient as against subsequent purchasers. But it has always been held in the case of sheriff's deeds, that their acknowledgment in open court, and the minute taken of them of record by the prothonotary, is a sufficient recording within our recording acts; differing in this respect from other deeds and conveyances, which may be acknowledged before a judge, justice, or other officer, and must be recorded in the recorder's office of the proper county. This distinction has existed in Pennsylvania ever since the passage of the act of 1705, relative to executions, and the act of 1715 establishing a recorder's office and sheriff's deeds have, it is believed, been rarely recorded in the latter. It is true that this may be an inconvenience to purchasers and others, in examining titles ; but they have the opportunity of ascertaining sheriff's convey

ances, by resorting to the minute books of the courts, in which an abstract of the contents of sheriff's deeds acknowledged there, is regularly kept, and a copy of which is evidence after showing the loss of the original. The point was expressly determined as long ago as the year 1782, in Shrider v. Nargan, 1 Dall. 68, where the objection was made, that a sheriff's deed of the sale of lands under a writ of venditioni exponas, not being recorded in the rolls office according to the act of assembly of 1775, could not be read in evidence, but it was not allowed, because, says McKean, C. J., it was acknowledged in court ; and the registering it in the prothonotary's office, as is always done, is a sufficient recording within the act. This decision has never been contradicted, but the usage has been in accordance with it, and the decision is recognised as late as 1814 by Judge Yeates, in McCormick v. Meason, 1 S. & R. 96, who said it had been determined that an acknowledgment by the sheriff in open court, and a minute of this on the record, was equivalent to recording, and that this was before he came upon the bench. The point certainly ought now to be considered as beyond dispute."

1873 Kaul et al. v. Lawrence et al.; 73 Pa. 410; 1873; 416

"OPINION: [*415] The opinion of the court was delivered, May 17th 1873, by

Agnew, J. — After having given evidence of a treasurer's sale [*416] and laid the usual ground by proof of a diligent and fruitless search for the treasurer's deed, the plaintiffs offered the record in the prothonotary's docket, of the acknowledgment of the deed, to prove its existence and contents. To this the defendants excepted, but we think without sufficient reason. This is the usual and proper mode of proving the existence of the deed, and identity of the land sold and conveyed by the treasurer."

1877 Watson et al. v. Jones et al.; 85 Pa. 117; 1877; 124

"OPINION: [*124] Mr. Justice Gordon delivered the opinion of the court, October 1st 1877.

The treasurer's deed, for tract No. 768, to the commissioners of Warren county, having been lost, its delivery and contents were properly proved by the books found in the custody of the proper officers. In the case of Halsey v. Blood, 5 Casey 319, the minute of acknowledgment, made by the prothonotary, was held to be competent for such purpose, but this evidence would certainly not be superior to that furnished by the records kept by the officers who made the sale. It is urged, however, that the treasurer's sale-book offered was not competent, forasmuch as it contained but transcriptions of the sale lists, and was therefore not an original document. But we do not so regard the matter. The book appears to have been kept by Thomas Clemons, the treasurer for the year in which this land was sold, and admitting that it contained but transcriptions from his temporary lists, yet being made [**19] by himself, no doubt in order to put the evidence of his own work in a safe and convenient form, quoad that work, however it might be as to that of others found with it, it must be regarded as original evidence."

1879 Goodman v. Sanger; 91 Pa. 71; 1879; 75 - 77

"SYLLABUS: A deed made by a treasurer to the commissioners of a county for a tract of land sold by said treasurer for taxes, according to the provisions of the Act of March 13th 1815, is not void as against a subsequent purchaser, from the former owner of the land, because the deed was not recorded in the office [**8th p.] for recording deeds of the county in which the land was situate, within six months after its execution. . . . . The court below held that the deed should have been recorded in Columbia county, and that

such a deed was within the recording acts. Held, that this was error, that the purchaser of unseated land was bound to examine the records in the commissioners' office, and if he found one county had been carved out of another it was incumbent upon him to search the records of said office in the old as well as the new county."

"OPINION: [*75] Mr. Justice Trunkey delivered the opinion of the court, June 23d, 1879."

"The Act of March 13th 1815, which makes it the duty of county commissioners to buy unseated lands at tax-sales requires them to provide a book and enter therein the name of the person as whose estate the same was sold, the quantity of land, and the amount of taxes it was sold for. In that book they shall charge every such tract with reasonable county and road tax, for five years, if the land shall remain so long unredeemed. It may be redeemed within said period by paying the taxes for which it was sold and costs, and the taxes which shall have been assessed from year to year after the sale, with interest, and thereupon the commissioners shall convey the land to the owner, by deed poll, endorsed on the back of the treasurer's [* * 12] deed to them. Such is the prescribed record of their purchase and other proceedings. It is also made the duty of the commissioners' clerk to enter said sales in their book of minutes, and any redemption which may happen, and sales by them after the right to redeem has passed over. An assessment of taxes is essential to authorize a sale, the record of which is kept in the commissioners' office. On that depends the validity of the sale. The assessment, the public sale, the deed, are links in the chain, and if the first two be wanting the owner is not divested of his title. Therefore, a record of the deed only even after the day for redemption has passed, is not enough to show that such title as the owner had is vested in the grantee. The evidence of the authority to sell, of the sale, and of the execution of the deed may be found in the commissioners' office. The law demands that records thereof shall be made and kept there, not at full length, but to such

extent as gives ample notice to all persons interested."

"When unseated land is sold to one, other than the county, the [*76] treasurer must acknowledge the deed for the same in open court. For reasons given by Gibson, C. J., in [** 13] Seechrist v. Baskin, 7 W. & S. 403, such acknowledgment does not authorize an entry of the deed in the recorder's office; nor is the deed itself within the purview of the recording laws. He was speaking of a sheriff's deed and said, "it is a link in a chain of judicial proceeding; and being already of record it would be as useless to record it over again, for purposes of notice, as it would be to record the other proceedings in the action; it would occasion perplexity and uncertainty, if purchasers were bound to resort to different offices, as independent sources of information, instead of but one. Such a deed might be beneficially recorded for purposes of preservation; but to authorize it would require a statute." A treasurer's deed is a part of statutory proceedings of public officers, a prescribed entry of which is made and kept in books in a public office, and for like cogent reasons that record is sufficient. Since the decision in Seechrist v. Baskin, the Acts of 1846, Pamph. L. 124, and 1849, Pamph. L. 344, authorize deeds of sheriffs, treasurers and county commissioners to be recorded in the office of the recorder of deeds in the county where the lands lie; and the records [** 14] thereof, or duly certified copies, shall be evidence where the original deeds would be. These acts appear to be solely for preservation of the deeds and making exemplifications evidence; they dispense with no proofs previously necessary to support the deeds. Nor is it their purpose to make the respective records notice of a sheriff's sale, or of a sale for taxes."

"The acknowledgment of a treasurer's deed to the county commissioners is before a justice of the peace. The grantees are public officers who make a minute of their purchase and subsequent proceedings respecting the land, which may be redeemed by the owner, and if so the deed shall be given to him. Perhaps in this may be found a reason for dispens-

ing with acknowledgments in open court, but none for bringing the fragment of evidence within the recording act."

". . . . But as already noted, a treasurer's deed to a private person could not have been recorded under that act, prior to 1846. The land remained unseated, and a purchaser was bound at his peril, to look to the proper records to learn if the title was clear. Who ever heard of one going to the office of the recorder of deeds to examine if there was an outstanding tax title for an unseated tract? As well might he go to the prothonotary's office to ascertain if taxes were in arrears. . . . ."

1894 Lee, Receiver of Fox et. al., Appellants v. Newland et. al.; 164 Pa.360; 30 A. 258; 1894; pp. 10 to 15.

"In Bellas v. McCarty, 10 Watts 13, it was held that the acknowledgment of a sheriff's deed is a judicial act and must be acknowledged in open court, of which the minutes of the court made by the order thereof are the proper evidence. The case is very carefully considered and the precise points decided by the majority of the court are carefully stated at the end of the opinion by Mr. Justice ROGERS as follows:

"'This court are of opinion that the acknowledgment is a judicial act, and that a sheriff's deed must be acknowledged in open [p. 11] court to be valid against a bona fide purchaser without notice either actual or constructive. That parole evidence of the acknowledgment is inadmissible in a collateral proceeding, whether by witnesses present in court at the time of the acknowledgment by witnesses who saw the entry of the acknowledgment on the deed, or by the production of the deed itself, with an acknowledgment on the back, when no registry has been made of it in court. We say this cannot be in a collateral proceeding, although by the last case put it would be competent for the court to amend the record by making a registry of the acknowledgment, though this would in no case be permitted without saving

the rights of third persons.'

"In Patterson v. Stewart, in the same book, at page 472, these principles were applied by the court in a similar case, namely, one in which the sheriff's deed was lost, but secondary proof was made of its contents, including the certificate of its acknowledgment in open court endorsed on the back. In Foust v. Ross, 1 W. & S. 508, it is said that the certificate of the prothonotary on the deed is prima facie evidence of acknowledgment where it does not appear that there is in fact no [p. 12] registry on the records of the court; and in Duff v. Wynkoop, 74 Pa. 300, the certificate on the deed appears to have been received in evidence, though no question was made that the acknowledgment was duly registered. But the decision that, in the absence of a record among the minutes of the court, no other evidence is sufficient, is not shaken by any subsequent case which we have been referred to or which has fallen under our observation.

"That the acknowledgment of a treasurer's deed in open court is subject to the same principles as those affecting the deed of a sheriff, cannot be doubted. By the act of 1804 the deeds for land sold for taxes were to be made by the sheriffs, and until 1809 they were so made. Subsequent laws transferred the duty from the sheriffs to the county treasurers, but without affecting the mode of proceeding. The acknowledgment of the deed in both cases is a judicial act, and passes the title of real estate from the former owner to another by operation of law. In the case of sales for taxes the registry of the acknowledgment in open court is the only record which the law requires to be kept from which any person interested, former owner or intending [p. 13] purchaser, can learn whether the land has or has not been sold for taxes. True, there may be a book kept in the treasurer's office, which will give notice, and there may be a record of the deed in the recorder's office, but the former is not required, and the latter was not authorized until 1846. The courts have uniformly given to the record of acknowledgment in open court the same effect, whether the deed was made by the sheriff or treasurer. See Duff v. Wynkoop, supra.

"The minutes of the court being in evidence in this case and showing no registry of any such deed as that exhibited by the plaintiffs as the foundation of their title, we are required, both by authority and the reason of the case, to hold that the acknowledgment of the deed in open court as required by law has not been proved. Whether or not, upon application of the plaintiffs, the record might have been amended, we are not at this time required to determine. We have grave doubts whether the facts in evidence here would justify it, but at all events it has not been done.

"A single question remains. Is a deed from a treasurer for land sold at tax sale valid to pass the title without acknowledgment in open [p. 14] court?

"We think this must be answered in the negative. The acknowledgment is something more than a mere authentication of the treasurer's signature; it is a judicial act, the completion of the process by which the land of a citizen is taken for his debt to the public. The law gives him two years in which to redeem, and the test of regularity in many cases has been whether or not the owner, coming to examine, would learn of the sale of his land. As we have said already, the minute of the acknowledgment is the only public record required by law which will afford that information. Moreover, though the sale may be irregular, even though no surplus bond were taken, the limitation in the act of assembly bars the owner from recovering his land after five years from the delivery of the deed to the purchaser. This is because the law authorizes the owner to bring ejectment against the purchaser at a tax sale whether in possession or not. But if the deed is not acknowledged in open court and duly registered, how shall the owner know, if he search the records ever so carefully, that his land has been sold, or whom he shall bring his ejectment against, or how long he has to redeem. [p. 15]

"These things may indeed be ascertainable from other records kept without any legal requirement, but in requiring the treasurer to acknowledge his deed in open court the law intended to consummate the confiscation of property for non-payment of taxes by a solemn act done publicly in

open court by whose records it would always appear, that no person interested could justly claim to be ignorant. It is the duty of the purchaser to see that his deed is so acknowledged and registered, and of every purchaser of a tax title to examine the record of acknowledgments for himself."

1934 City of Uniontown v. McGibbons et. al.; 115 Pa. Super 132; 1934; 139 - 141

"Appellant, however, contends that the sale in the instant case was not a "judicial sale." The procedure on any tax or municipal claims, under the Act of 1923, is under the control of the court. Any sale thereunder is subject to confirmation by the court. It is the power of the court, therefore, which controls and gives validity to the sale. It does not differ in any respect from other judicial sales. As stated by Mr. Justice SIMPSON, in Tide Water Pipe Co. v. Bell, 280 Pa. 104, 117 (124 A. 351): "We find nothing in these cases to cause us to differentiate a tax sale from other judicial sales."

As to what is a judicial sale has been fully discussed by our Brother BALDRIGE in the case of City of New Castle v. John Whaley's Heirs, 102 Pa. Superior Ct. 492, 496 (157 A. 503): "A judicial sale is defined by Rapalje and Lawrence, Vol. 1, page 699, as a sale under the judgment, order, or decree of the court; a sale under judicial authority, by an officer legally authorized for the purpose, such as a sheriff's sale, an administrator's sale, etc." Bouvier, Vol. 2, page 1754, Rawle's Third Edition, gives as a definition: "A sale; by authority of some competent tribunal, by an officer authorized by law for the purpose." See also Borough of State College v. Pontius, 112 Pa. Superior Ct. 440, 171 A. 293.

In Lee v. Newland, 164 Pa. 360, it was held that a deed from a county treasurer, for land sold at a tax sale, is not valid to pass title without acknowledgment in open court and a record of the acknowledgment in the minutes of the court;

that the acknowledgment of a tax deed is a judicial act which must be done in open court, and that the minutes of the court are the only proper evidence of the acknowledgment.

In Osmer v. Sheasley, 219 Pa. 390 (1908), the same doctrine was again announced by the Supreme Court in an opinion by Mr. Justice MESTREZAT, wherein he quotes from the opinion by Mr. Justice SHARSWOOD in Hoffman v. Bell, 69 Pa. 444, 451: But for reasons which appealed to the legislature, it was thought that the acknowledgment of the deed should be in open court and that thereby the sale should receive judicial sanction. In that way the acknowledgment of the deed, conveying title to real estate, would be placed upon the records of the court. This would afford easy and absolute proof of the existence of the deed and the conveyance of the real estate to the purchaser. It would give the latter's title judicial sanction as well as perpetually preserve the evidence of it. This enactment, requiring the acknowledgment of a treasurer's deed to be in open court as a prerequisite to a valid tax title, has met the approval of the people of the Commonwealth for more than a century. Its wisdom commends itself to lawyers and laymen alike, and, while subsequent legislatures have amended the statute in many respects, they have never changed or altered this provision."

The law requiring a treasurer's sale to receive the approbation of the court before it shall be binding or valid to pass the title, in effect makes the sale the act of the court; hence the propriety of denominating such a sale a "judicial sale."

1953 Henry, G.M., 1953, Pennsylvania Evidence; West Pub. Co.; see p. 359, Sec. 355, Judicial Records - Domestic - Docket Entries (with note No. 38): "The record of a deed in the Prothonotary's Office is equivalent to recording and is competent evidence without production of the deed"; citing Stonebreaker v. Short, 8 Pa. 155, (1848)

1959 PROCTOR, et al., Appellants, v. SAGAMORE BIG GAME CLUB, U.S. COURT OF APPEALS THIRD CIRCUIT; 265 F.2d 196; 1959 U.S. App. LEXIS 5217; 1 Fed. R. Serv. 2d (Callaghan) 829; 1959

Excerpt:
The invalidity of the tax deed, plaintiffs say, was due to the failure of the treasurer to acknowledge the tax deed in open court as was required by Section 2 of the Act of April 3, 1804, P.L. 517, 4 Sm.L. 201. This omission is established, plaintiffs assert, by the failure of the 'Trial List and Court Minutes' of the Court of Common Pleas of Elk County to make any reference to the acknowledgment. But the silence of the minutes in this regard does not invalidate the sale if in fact the tax deed was acknowledged in open court. The Act of May 5, 1941, P.L. 38, § 1, 21 P.S. § 283 was enacted to make tax titles secure against just such an argument as plaintiffs make. n5

The evidence is uncontroverted that the acknowledgment did in fact take place in open court on July 3, 1894. [**7] The certificate of the Prothonotary endorsed on the deed says so, and it is prima facie evidence of that fact. Act of May 11, 1911, P.L. 257, § 1, 21 P.S. § 48. [1292 *7] An entry in the book entitled 'Acknowledgment of Treasurer's Deeds' kept in the Office of the Prothonotary in Elk County likewise attests the open court acknowledgment on July 3, 1894. The 'Trial List and Court 'Minutes' reveal that the Court of Common Pleas of Elk County sat on July 3, 1894. Plaintiffs' contention that the tax deed was invalid because it was not acknowledged in open court is untenable.

n5. 21 P.S. § 283 Provides:
'Whenever heretofore any land has been sold by the county treasurer of any county for the purpose of securing the payment of delinquent taxes which were assessed and levied against such land, and the county treasurer in pursuance of such sale executed a deed for said lands, and the acknowledgment of such deed by the county treasurer was defective

in any respect, or where the records of the court failed to show a minute of such acknowledgment in open court, such sale and such deed shall not be invalidated by reason of such defective acknowledgment, if, in all other respects, the laws relating to the holding of such sale were fully complied with and the deed was, in fact, acknowledged before a judge of said county; and all such treasurers' sales and treasurers' deeds are hereby ratified, confirmed and validated; and the title to any such land purchased by any person or by the county commissioners of any county at such treasurers' sale and the deed executed and acknowledged to such purchaser is hereby declared to be as valid as if such deed had been acknowledged in open court and a proper minute thereof made in full conformity with the law relating thereto. 1941, May 5, P.L. 38, § 1.'

1971 United States, Plaintiff, v. 137.02 acres of land; 334 F. Supp. 1021; 1971; 1024

"Although it is true that some tax deeds are required before delivery to 'be recorded in the office for the recording of deeds at the cost of the purchaser,' under Act of July 7, 1947, P.L. 1368, art. VI, Sec. 608, as amended, 72 P.S. 5860.608, no similar requirement for a Treasurer's deed exists. The act of May 29, 1931, P.L. 280, Sec. 14, 72 P.S. 5971n (n 4) requires "each such deed to be duly acknowledged in the court of common pleas, and such acknowledgment shall be duly entered and recorded by the prothonotary of said court in the treasurer's deed book ....." The acknowledgment of the deed in the instant case was taken in open court on December 10, 1956, by the President Judge of the Court of Common Pleas of Centre County and such acknowledgment was recorded in Treasurer's Deed Book No. 1 at page 118. The deed itself was recorded in the Office of the Recorder of Deeds of Centre County on June 24, 1968.

Recording of the acknowledgment of the deed in the

Treasurer's deed book satisfies the recording requirements for Treasurers' deeds.

n 4. This Act was repealed insofar as it applied to taxing districts coming within the provisions of 72 P.S. 5860.101 - 5860.803, but remains applicable to the instant sale." Muir, J.

NOTE: Although Judge Muir's citation, the act of May 29, 1931, P.L. 280, Sec. 14, (Title 72 P.S. 5971n), is a Seated Land Tax Sale Law, many of its terms, including specifically the Prothonotary's recording mandate, can be followed in a direct evolutionary course of legislation back to the Unseated Land Tax Sale Law of 1804 / 1815, which the General Assembly used to model much of Pennsylvania's real property tax sale law.

Nullity - the non-existence of title:

Prof. Philbrick states (U. Penn. L. Rev., v. 91, n. 2, Dec. 1944, p. 169) that where deeds into a chain are nullities:

> "a purchaser claiming there-under must fail because he cannot be a purchaser..... At this point it may be remarked that in the present situation the recording acts do not affect the fact that a man who has no title can convey none, and that no would-be purchaser can be a purchaser merely because he gives value, whatever his innocence. Those statutes pre-suppose a title holder who gives title to a first grantee, but who, though left without title, retains a power to divest his first grantee and give title to a second under the conditions imposed by the statutes. This distinction, between the facts to which the general legal rule and the recording acts respectively apply, has occasionally seemingly been over looked."

> "Such cases are those of hostile and distinct titles, and the question of superiority between them depends, not upon their being recorded, but upon their intrinsic merits."

> "A recorded instrument, if it actually affects the title, gives record notice to persons whose claims run through it and depend upon the rights of its maker when he made it. The recording statutes have application only to conflicting claims [170] running thus through a common record owner. The case of totally unconnected lines of record title is beyond their purview. Accordingly, between such lines notice is inoperative."

Prof. Philbrick again (U. Penn. L. Rev., v. 93, Mar. 1945, p. 297) states:

> "To repeat what has been already remarked in discussing record notice in these cases of totally distinct and hostile title-chains, a "purchaser" claiming through an invalid chain will fail because, nullities being involved, he cannot for that reason acquire true title, and not because record notice by a disconnected valid chain prevents his acquisition in good faith of a title otherwise available."

In this regard, Lessee of Henry v. Morgan and Cox (2 Binn 497, 1810) established that the courts must, in a case of competing chains of title, first determine the precise nature of connection or privity between the two claimants' chains, as reflected in the words of Prof. Philbrick, supra. Then, and only then can the courts determine whether or not notice under the 1775 Recording Act (21 P.S. 444) or 21 P.S. 351 are applicable to the case. Quoting Chief Justice Tilghman,

> "it would be unjust, that one, who has purchased under a bad title, should have his estate confirmed by the mere accident of a deed between two persons with whom he had no privity or connexion, being unrecorded." (Lessee of Henry v. Morgan and Cox, supra., p. 502)

Application of the "60 year search practice" resurrects harsh penalties reminiscent of Pennsylvania's unconstitutional 'Act for Quieting Title to Real Estate, etc.,' Act of May 23, 1949 PL 1692 (Act No. 512), but without a trace of a due process "preserving clause". The 1949 act had such a clause, the inadequate nature of which relative to due process was, at least in part, the act's undoing. (Girard Trust Co., Trustee, Appellant, v. Pennsylvania Railroad Co., 364 Pa. 576, 1950; See Aigler, Mich. L. Rev., v. 50, n. 2, Dec. 1951, pp 191 - 195). Application of the "60 year search" in the manner which it is used herein by Trial Court is tantamount to judicial re-enactment of that Act as a legally binding title defect curative.

Girard Trust Company, Trustee, Appellant, v. Pennsylvania Railroad Company

The Supreme Court of Pennsylvania

364 Pa. 576; 73 A.2d 371; 1950 Pa. LEXIS 398

Argued April 20, 1950; May 22, 1950

PRIOR HISTORY: [***1]

Appeals, Nos. 203 and 204, Jan. T., 1950, from decrees of Court of Common Pleas Nos. 5 and 2 of Philadelphia County, Dec. T., 1949, Nos. 2340 and 2341, respectively, in cases of Girard Trust Company, Trustees, etc., v. The Pennsylvania Railroad Company and The Pennsylvania Company for Banking and Trusts, Trustee, etc., v. The Philadelphia, Baltimore and Washington Railroad Company. Decrees affirmed.

Proceedings to preserve liens of mortgage and ground rent, respectively, under the Act of May 23, 1949, P.L. 1692.

Preliminary objections of defendants sustained and final decrees entered dismissing complaints, before SMITH, P.J.,

and FENERTY, J., opinion by SMITH, P.J. Plaintiffs appealed.

DISPOSITION: The several decrees are separately affirmed; each party to pay its own costs.

COUNSEL: Boyd Lee Spahr, with him Knox Henderson and Ballard, Spahr, Andrews & Ingersoll, for appellants.

Charles Myers, with him Robert M. Landis and Barnes, Dechert, Price, Myers & Clark, for appellees.

Thomas P. Mikell, with him Edward M. David, Maurice Bower Saul and Saul, Ewing, Remick & Saul, for Corporate Fiduciaries Association of Philadelphia, amicus curiae.

[***2] Harry F. Stambaugh, Special Deputy Attorney General, with him T. McKeen Chidsey, Attorney General, for Commonwealth.

JUDGES: Before DREW, C.J., STERN, STEARNE, JONES and BELL, JJ.

OPINION: [*578] [**371] OPINION PER CURIAM

The Act of May 23, 1949, P.L. 1692, is so incomplete, conflicting and inconsistent in its various provisions and so unsusceptible of rational interpretation as a whole as to be incapable of judicial enforcement: cf. Willcox v. Penn Mutual Life Insurance Co., 357 Pa. 581, 601, 55 A. 2d 521. [**372] In addition thereto, the Act offends against both the Federal and State Constitutions by attempting deprivations of private property without due process of law and by impairing the obligations of valid and subsisting contracts. The Act is therefore void as well as inoperative. Nothing more need be said in justification of these conclusions than is contained in the able opinion of President Judge SMITH for the court below.

The several decrees are separately affirmed; each party to pay its own costs.

DISTRICT AND COUNTY REPORTS
[71 D. & C. 533] (1950)
Girard Trust Company et al. v. The Pennsylvania Railroad Company et al.

Constitutional law - Act of May 23, 1949 - Requiring affirmative action to continue lien of perpetual mortgage and irredeemable ground rent without due date more than 59 years old - Incapability of rational interpretation - Impairment of lien - Deprivation of property - Pennsylvania Constitution, art. III, sec. 7; art. I, sec. 9 - Severability

1. The Act of May 23, 1949, P. L. 1692, is unconstitutional and void, not only because it is confusing and incapable of rational interpretation, but because its requirement that affirmative action be taken to continue the lien of a mortgage or ground rent, having no due date, and which has been executed more than 60 years before, even though no such action was required by the original obligation, is an impairment of lien in violation of article III, sec. 7, of the Constitution of Pennsylvania and a deprivation of property within the prohibition of article I, sec. 9, of the Constitution of Pennsylvania, especially where, since interest has at all times been currently paid and there has been no other default in the obligation, the holders of the mortgage or ground rent have no basis on which to bring an action to foreclose or enforce them under the terms of the original document.

2. While the Act of May 23, 1949, P. L. 1692, contains a severability clause, its different parts are so mutually dependent on and connected with each other as to warrant a belief that the legislature intended them as a whole, and since it is invalid as to perpetual mortgages and irredeemable ground rents created before its passage without due date, and now more than 60 years old, it is invalid in its entirety.

Preliminary objections to complaint. C. P. No. 5 of Philadelphia County, December term, 1949, no. 2340; C. P. No. 2 of Philadelphia County, December term, 1949, no. 2341.

Knox Henderson, Boyd Lee Spahr, Ballard, Spahr, Andrews & Ingersoll, for plaintiffs.

Charles Myers, for defendants.

SMITH, P. J., April 6, 1950.-These proceedings come before the court on preliminary objections to plaintiffs' bill of complaint to quiet title to real estate which plaintiffs have brought pursuant to the Act of May 23, 1949, P. L. 1692, asking in each case that [534] plaintiff's complaint be dismissed because the act of assembly is void as being in conflict with the Constitution of the United States and the Constitution of this Commonwealth.

The case of The Pennsylvania Company for Banking and Trusts, Trustee Under the Will of Elon Dunbar, Deceased, v. The Philadelphia, Baltimore and Washington Railroad Company, C. P. No. 2, December term, 1949, no. 2341, was transferred to this court with the approval of Court of Common Pleas No. 2 and the litigants in this case.

Complainants in each instance filed complaints to quiet title. The preliminary objections in each case were filed thereto in the following manner: The court has no jurisdiction because jurisdiction is based on the Act of May 23, 1949, P. L. 1692; that this act is invalid and void in that it is in conflict with the Constitution of Pennsylvania and the Constitution of the United States. Argument briefs have been filed by each of the litigants, the Attorney General of the Commonwealth of Pennsylvania and by the Corporate Fiduciaries Association of Philadelphia, as amicus curiae.

In action no. 1, brought by the Girard Trust Company, trustee under mortgage of the Pennsylvania Railroad Company, dated July 1, 1873, recorded in the office for recording of deeds, etc., in and for the County of Philadelphia, in Deed Book F. T. W., no. 70, page 363, etc., against the Pennsylvania Railroad Company, it is averred that plaintiff is the sole trustee under the mortgage; that pursuant to the terms thereof, the railroad company issued bonds in the principal amount of $49,000,000, dated February 1, 1915, payable

August 1, 1960, with interest thereon payable semiannually at the rate of 41/2 percent per annum, which are now outstanding in the hands of the public; that all of the interest due on these bonds has been paid and no default exists in the terms thereof; that in the [535] mortgage dated July 1, 1873, no due date is recited therein and more than 50 years have elapsed since the date of the mortgage.

In the cause of action no. 2, brought by the Pennsylvania Company for Banking and Trusts, Trustee Under the Will of Elon Dunbar, deceased, against the Philadelphia, Baltimore and Washington Railroad Company, it is averred that by indenture dated June 2, 1853, Eliza Howard Burd et al., executors of the last will and testament of Edward Shippen Burd, deceased, conveyed premises located at the Southwest corner of Thirty-first and Chestnut Streets, to the West Chester and Philadelphia Railroad Company, reserving thereout and therefrom an annual ground rent of $1,590.76 per annum, payable in half-yearly payments on the first day of January and July of each and every year forever, which indenture was recorded in the office for the recording of deeds for the County of Philadelphia on June 27, 1853, in Deed Book T. H. no. 97, page 61, etc.; that by the terms of the indenture, it was provided that, if the grantee therein named or its successors or assigns, did at any time within 10 years from the date thereof pay or cause to be paid to grantors, their heirs or assigns, the sum of $26,512.50 and the arrearages of the yearly ground rent to the time of such payment, then the same should forever thereafter cease and be extinguished; that neither grantee nor its successors or assigns did within the 10-year period from the date of the indenture pay the sum to grantors, their heirs or assigns, with the result that the ground rent so reserved from and after 10 years from the date of the indenture became and is irredeemable; that plaintiff is the present owner and holder of the ground rent reserved in the indenture; that the present owner of the ground out of which the irredeemable ground rent issues is defendant, the Philadelphia, Baltimore and Washington Railroad Company, defendant being [536] the successor by merger to the West Chester

and Philadelphia Railroad Company; that defendant is the present owner of the premises and successor by merger to the original covenantor of the ground rent, and is the only party liable to plaintiff for the payment of the ground rent; that all semiannual payments of the yearly ground rent which have become due and payable have been paid by defendant or its predecessor, and no action or proceeding has heretofore been instituted for the payment or collection of the ground rent; that more than 50 years have elapsed since the date of the creation of the ground rent and since the date on which it became irredeemable.

The bills of complaint as filed come within the provisions of the Act of May 23, 1949, P. L. 1692. The sole question involved is as to the jurisdiction of this court. If the Act of 1949, supra, impairs the obligation of a contract within the meaning of the Constitution of the United States or the Constitution of Pennsylvania, this court has no jurisdiction in this matter. On the other hand, if the act is constitutional, this court has jurisdiction over this matter.

Section 1 of the Act of May 23, 1949, P. L. 1692, provides:

"In order to quiet title to and to facilitate alienation, conveyance, transfer and sale of real estate in all cases in which under any deed, mortgage, ground rent, or decree of any court of common pleas of this Commonwealth, any money has been or may hereafter be charged against land, payable presently or at a future time, and the period of 50 years has elapsed, including minority and disability, or shall have elapsed after the principal of such encumbrance or charge has become or shall have become due and payable, and where no due date is recited in such instrument then 50 years after the date of creation or date of such instrument, and no action or proceeding shall have been [537] instituted for the payment or collection of such charge, mortgage, ground rent, or decree, as provided by law, within said period of 50 years, on account of such charge, mortgage, ground rent, or decree against the owner or owners of the land encumbered or charged therewith, there shall be a conclusive presumption of payment, release, or satisfaction

thereof, and no such charge, mortgage, ground rent, or decree shall be effective or enforceable against any owner of real estate so encumbered or charged unless within one year of the effective date of this act a proceeding to enforce payment of or to preserve, revive or continue such encumbrance or charge shall be instituted against the present owners of real estate encumbered or charged therewith, as hereinafter provided."

The act as written is confusing. It makes its enforcement incapable of rational interpretation. It attempts to cover those eases where a mortgage, ground rent, etc., is charged against land, and the period of 50 years has elapsed after the principal has become due or shall become due and payable; and where no due date is recited in the instrument, then 50 years after the date of creation or the date of the instrument and no action has been instituted for the collection of such mortgage or ground rent, etc., as provided by law within the period of 50 years against the owner of the land encumbered-then there shall be a conclusive presumption of payment. It seems apparent that if the principal has become due and payable, some due date must be contained in the instrument. That statement standing alone confuses the other statement where it is stated, "and no due date is recited in such instrument". It seems to us that these statements which apparently contradict each other, would be bound to cause perplexities to exist in the minds of good conveyancers. Again, where it is stated, "then 50 years after the date of creation or date of such [538] instrument, and no action shall have been instituted as provided by law, within 50 years", etc., it seems to us that in those mortgages and ground rents, etc., which are over 50 years of age, and where the interest has been fully paid thereon, that this sentence is meaningless because no action could have been brought by law for the payment or enforcement of such mortgage or ground rent, etc., without default of the mortgage payment of interest or rent. The law seems to be well settled that a mortgagee cannot recover possession of mortgaged premises before some condition in the mortgage is broken or where it appears under the terms of the mort-

gage that the mortgagor should hold possession until a breach occurred. In Soper et al. v. Guernsey, 71 Pa. 219, Mr. Justice Sharswood made this statement years ago and it is still the law. The mortgage of the Pennsylvania Railroad Company dated July 1, 1873, was given pursuant to express statutory authority, to wit, the Act of February 18, 1873, P. L. 129, which is quoted in the mortgage, being exhibit A in the plaintiff's statement of claim. This act of assembly authorizes the railroad company to issue, from time to time, bonds, and to secure, from time to time, these bonds by one or more mortgages of the whole or any portion of the railroad company's property, real and personal, and corporate rights and franchises acquired, and to be acquired.

Section 2 of the Act of 1873, supra, provides that any mortgage executed and delivered as authorized thereby, shall be recorded in Philadelphia County, and shall thereupon be a lien on the property mortgaged wherever situated. This mortgage was duly recorded in Philadelphia County and thus became a lien on the property situated in Pennsylvania. Exhibit A of plaintiff's statement of claim shows that the mortgage was recorded also in the Counties of Hudson, Essex, Middlesex, Mercer, Burlington, Camden, Somerset and Union, in the State of New Jersey [539]

The mortgage itself recites the resolution that the railroad company execute and deliver to three individuals and their successors as mortgagees, in trust, a mortgage of the property mentioned therein, "which mortgage shall be, and is hereby declared to be, a continuing lien, to secure the full and final payment of one hundred thousand bonds to be issued as the amount of the fullpaid outstanding capital stock may justify; that is to say, as well the one hundred thousand bonds to be first issued, as those which may be made and issued from time to time after the payment of the whole or any portion thereof or of any subsequent issue, but never to exceed, however, at any time, one hundred thousand bonds outstanding...."

The mortgage provides that the railroad company, for securing the payment of the bonds which it was then authorized to issue, as well as, those which may be issued from

time to time when additional capital stock shall be outstanding, granted and conveyed to the three individuals therein named and their successors, the property therein described, in trust, for the use, benefit and security of the several persons and bodies corporate who shall be or become the holders of these bonds, as well as those first to be issued as those which may be made and issued from time to time after the payment of the whole or any portion thereof, or of any subsequent issue not exceeding the limit of 100,000 bonds.

The mortgage further provides that if the railroad company shall make default in payments due on the bonds, as therein specified, the trustees, upon the written request of the holders of one fourth in amount of the outstanding bonds, may enter upon and take possession of the mortgaged premises, and operate, manage, and control and use the same to the best advantage, or sell the mortgaged premises at public sale and distribute the proceeds among the bondholders. At the [540] end of the default clause the following language appears:

". . . It being further distinctly understood and agreed (any law or usage to the contrary notwithstanding), that neither the parties of the second part hereto nor their successors or successor in the trust, nor the holder or holders of the bonds intended to be hereby secured, or any of them, shall sell the premises hereby mortgaged, or intended so to be, or any part thereof, under proceedings, either at law or in equity, otherwise than in the manner herein provided for the recovery of the whole or any portion of the principal or interest of the said bonds; it being the intention and agreement of the parties hereto, as well for the better protection of the holders of the bonds hereby secured against changes of the law in respect to the remedies for the collection of debts, as for the securing of the largest possible price for the mortgaged premises, in the event of a sale of the same or any portion thereof, that the mode of sale hereinbefore provided shall be exclusive of all others."

It would, therefore, appear that since this mortgage was given to secure bonds to be issued from time to time in the future, a due date in the mortgage would have been out of

place. A reading of the mortgage shows that the parties made a definite agreement as to the remedies available to the mortgagees in the event of default. The act in question, to wit, Act of May 23, 1949, P. L. 1692, provides that as to any mortgage containing no due date which is more than 50 years old, such as this mortgage is, "there shall be a conclusive presumption of payment, release, or satisfaction thereof, and no such . . . mortgage . . . shall be effective or enforceable against any owner of real estate so encumbered or charged", unless, within one year of the effective date of the act, a proceeding to preserve or continue such encumbrance shall be instituted. It [541] seems clear to us that this act would prohibit the mortgagee from availing himself of the remedies which were agreed upon in the mortgage itself in the event of default, unless within a specified time a proceeding to continue the mortgage charge shall be instituted. It seems to us that this modification in the remedies is not reasonable but is so arbitrary and unreasonable as to make it an unconstitutional act.

Plaintiff, under the Act of July 12, 1705, 21 PS 0791 et seq., possesses no right to bring an action to foreclose this mortgage since it is evident that no default has occurred. The right to foreclose a mortgage is purely statutory, and it has been held that this act must be strictly construed: Federal Land Bank of Baltimore v. King, 294 Pa. 86. In Galey v. Guffey, 248 Pa. 523, Stewart, J., stated:

" '. . . whilst the legislature may not impair the obligation, they may modify the remedy. But, it sometimes happens that the parties contract concerning the remedy-that they stipulate in the body of the contract, that in ease of failure of payment by a certain day, there shall be no stay of execution, or that the mortgagees may enter and sell the mortgaged estate or that all exemption rights shall be waived. In such cases the rule is that the remedy becomes part of the obligation of the contract, and any subsequent statute which affects the remedy impairs the obligation, and is unconstitutional.... If the parties adjust or modify, the legal remedies for themselves by making them an express and substantive part of their contract, they cannot, as to

that particular contract, be changed by the legislature.'"

In the case of Beaver Co. B. & L. v. Winowich, 323 Pa. 483, 492, Mr. Justice Stern stated:

"Any law which enlarges, abridges, or in any manner changes the intention of the parties as evidenced by their contract, imposing conditions not expressed therein or dispensing with the performance of those [542] which are a part of it, impairs its obligation, whether the law affects the validity, construction, duration, or enforcement of the contract: Story's Commentaries on the Constitution, Book 3, ch. 34, sec. 1379."

On page 493 the learned justice also states:

"The amount of impairment of the substantive obligation of a contract is immaterial. Any deviation from its terms, however slight, falls within the meaning of the constitution: Greene v. Biddle, 8 Wheat. 1, 84; Ogden v. Saunders, 12 Wheat. 213, 266; Walker v. Whitehead, 16 Wall. 314, 318.

"'One of the tests that a contract has been impaired is that its value has by legislation been diminished. It is not, by the constitution, to be impaired at all. This is not a question of degree or manner or cause, but of encroaching in any respect on its obligations, dispensing with any part of its force.'"

It will be noted that the Act of May 23, 1949, P. L. 1692, limits and restricts the mortgagee's remedies by providing that they shall only be available if a proceeding to continue the lien of the mortgage shall be instituted prior to September 1, 1950. It seems to us that this legislation clearly impairs the obligation of the contract entered into by the parties by requiring a court proceeding in order to preserve the remedies stipulated in the contract, although the contract itself contains no such requirements.

The remedies established by the ground rent, which existed by law at the time when the deed was given, were also a contract of the parties. The principle applicable to such a situation is set forth in Edwards v. Kearzey, 96 U. S. 595, 607, where it is stated:

"The remedy subsisting in a State when and where a

contract is made and is to be performed is a part of its obligation, and any subsequent law of the State which so affects that remedy as substantially to impair and lessen the value of the contract is forbidden by the Constitution, and is, therefore, void." [543]

It appears to us that the Act of May 23, 1949, P. L. 1692, impairs and lessens the value of the ground rent contract by requiring costly court proceedings in order to continue its validity, and extinguishing the right if such proceedings are not instituted within a limited time, even though there is no default in the performance of its obligations and no dispute as to its validity. Again, since all of the semiannual payments on the ground rent which have become due and payable have been paid, the owner of the ground rent possesses no right under the existing law to institute any proceeding to establish a right which in fact he does not possess. The Act of 1949 says that an action must be brought to institute proceedings provided under existing law. It is manifest that there is no existing law for such proceedings where there is no default in the ground rent. Any reasonable interpretation of this provision shows that the act is impossible of rational interpretation and thus cannot stand. With a great many mortgages and ground rents held by corporations, banks and trust companies, with thousands of investors and bondholders scattered all over the world, where the interest and rents constitute a vital part of their investments, especially where they have been constantly and ,currently paid, it is difficult to see how this provision in the Act of May 23, 1949, P. L. 1692 is reasonable and proper. The effect of the Act of 1949 creates a serious innovation in the property law of this country. It would compel the foreclosure of mortgages not in default and it would seriously affect the property rights of those who had invested in these securities. It would also necessitate the refinancing of these companies and would impose costs and expenses upon those where the investments themselves yield but a small annual income. It would also destroy whatever rights were possessed by those who have bonds outside of the United States and in foreign countries. The evils which it

[544] purports to correct would be greatly overbalanced by the injury to the property rights of many companies and individuals. It would result in the impairment of liens in violation of article III, sec. 7, of the Constitution of Pennsylvania. No principle is more firmly entrenched in the law than that the laws which were in effect at the time a contract was made enter into its obligation and become an integral part of it. When an act of assembly is passed which affects not the remedy but affects the title where no rights have accrued that can be enforced, it is time to call a halt upon the enforcement of such a statute. Any act of assembly which operates retrospectively to take what is by existing law, the property of one man and without his consent, transfers it to another, with or without compensation, is in violation of that clause in the Bill of Rights, [Pa.] Constitution, article I, sec. 9, which declares that no man can be deprived of his life, liberty or property, unless by the judgment of his peers or the law of the land.

Thus the obligations, and the remedies provided in the mortgage and the ground rent, are protected by the State constitutions and cannot be impaired by subsequent legislative enactment. The Act of May 23, 1949, P. L. 1692, goes far beyond the Act of April 27, 1855, P. L. 369. The court there held that that act was constitutional since it merely deprived the owner of the remedy for the collection of his ground rent after the expiration of 21 years from any payment, suit, claim or demand for the same. The Act of 1949 provides that there shall be a conclusive presumption of payment, release or satisfaction thereof, and no such charge, mortgage, ground rent or decree shall be effective or enforceable. It will, therefore, be seen that this not only affects the remedy, but it affects the ground rent estate as well as the obligation of the mortgage contract even though they are current in all respects. [545]

One of the most irreconcilable parts of this act of assembly is that it creates litigation by requiring parties to institute an action where no controversy exists.

As to presumption of payment, it is one thing to apply this presumption to a delinquent charge. It is quite a dif

ferent thing to apply it to a perpetual mortgage or an irredeemable ground rent which is not in default and on which no action for payment can be brought as long as the current payments are being made. This act was a subsequent rule of law declaring property rights invalid after the 50-year period. As such, it is an unconstitutional deprivation of property and an impairment of the liens and obligations of contracts. It cannot be justified since it applies whether or not payment of principal is due, and whether or not current payments are being made.

This act requires a judicial determination in an adversary proceeding where there is no controversy. Suits must be instituted to preserve irredeemable ground rents and open end mortgages where no defaults have occurred, where no cause of action has arisen and where all parties are in agreement concerning, and admit the existence and validity of, the charge or obligation. This the legislature has no right to require.

The Act of May 23, 1949, P. L. 1692, contains a severability clause in accordance with the provisions of the Act of May 28, 1937, P. L. 1019, article IV, sec. 55. In the Act of May 23, 1949, P. L. 1692, however, the different parts are so mutually dependent upon and connected with each other as to warrant a belief that the legislature intended them as a whole, and that if part were invalid, the legislature would not have passed the remaining portions, then the dependent and connected portions will also be rejected, in spite of a severability clause. [546]

The act of assembly is invalid as to perpetual mortgages and irredeemable ground rents created before its passage without due date and now more than 50 years old, and serves no purpose. It would only tend to confuse and make titles uncertain. For this reason we declare the Act of May 23, 1949, P. L. 1692, designated as Act No. 512, invalid and void as unconstitutional.

Order

And now, to wit, April 6, 1950, the court sustains the preliminary objections filed by defendants in the case of

Girard Trust Company, Trustee Under Mortgage of The Pennsylvania Railroad Company, dated July 1, 1873, v. The Pennsylvania Railroad Company and in the case of The Pennsylvania Company for Banking and Trusts, Trustee Under the Will of Elon Dunbar, Deceased, v. The Philadelphia, Baltimore and Washington Railroad Company.

EDITOR'S NOTE.-The foregoing order has been affirmed by the Supreme Court in 364 Pa. 676. Since the opinion of the Supreme Court approving the foregoing opinion is extremely brief, the full text is published here for the convenience of the bar.

LAWS OF PENNSYLVANIA, SESSION OF 1949

Unconstitutional 'Act for Quieting Title to Real Estate, etc.,' Act of May 23, 1949 PL 1692 (Act No. 512)

AN ACT

To quiet title to real estate and to facilitate the alienation thereof; creating a presumption of payment, satisfaction or release, and making unenforceable any claim for money charged against real estate under any deed, mortgage, ground rent, or decree of any court of common pleas of this Common wealth, and correcting defects in title arising out of unrecorded deeds and breaks in chain of title and making claims thereunder invalid, by creating a presumption of release and satisfaction where such charges, mortgages, ground rents and decrees or defects of record arise, occur, exist, or are dated more than fifty years prior to the time of the institution of any proceeding hereunder to enforce payment, perfect, revive, or continue the aforesaid lien, charge or encumbrance, or to enforce any right arising out of such a defect in title, unless an action is instituted to enforce such charges, mortgages, ground rents, and decrees, as aforesaid, against the present owner, or action is taken to enforce any right arising out of such a defect in title within one year after the effective date of this act.

The General Assembly of the Commonwealth of Pennsylvania hereby enacts as follows:

Section 1. In order to quiet title to and to facilitate alienation, conveyance, transfer and sale of real estate in all cases in which under any deed, mortgage, ground rent, or decree of any court of common pleas of this Commonwealth, any money has been or may hereafter be charged against land, payable presently or at a future time, and the period of fifty years has elapsed, including minority and disability, or shall have elapsed after the principal of such encumbrance or charge has become or shall have become due and payable, and where no due date is recited in such instrument then fifty years after the date of creation or date of such instrument, and no action or proceeding shall have been instituted for the payment or collection of such charge, mortgage, ground rent, or decree, as provided by law, within said period of fifty years, on account of such charge, mortgage, ground rent, or decree against the owner or owners of the land encumbered or charged therewith, there shall be a conclusive presumption of payment, release, or satisfaction thereof, and no such charge, mortgage, ground rent, or decree shall be effective or enforceable against any owner of real estate so encumbered or charged unless within one year of the effective date of this act a proceeding to enforce payment of or to preserve, revive or continue such encumbrance or charge shall be instituted against the present owners of real estate encumbered or charged therewith, as hereinafter provided.

Section 2. In all cases where any defect in title appears of record by reason of unrecorded deed or deeds or break. or breaks in chain of title making the same unmarketable, arising, occurring, existing or dating more than fifty years prior to the filing of any proceeding under this act to remedy or correct such defect therein or to enforce any claim thereunder, a conclusive presumption of marketability shall be created, and no claim, title or proceeding thereunder shall be valid or enforceable against any owner of real estate in

the chain of title in which such defect in title appears of record unless within one year of the effective date of this act a proceeding to enforce any right arising out of such defect in title shall be instituted by any person or persons claiming any such right or title against the present owners of record of real estate affected thereby, in accordance with the provisions of this act.

Section 3. Any such proceeding arising under the provisions of sections one and two of this act shall be by an action for the payment or enforcement of said charge, mortgage, ground rent, or decree, or to enforce any right arising out of such defect in title, as provided under existing law, in the court of common pleas of the county in which the major portion of said land is situate.

Section 4. Such action or complaint to the court of common pleas under any proceeding arising under this act shall set forth to the best of plaintiff's knowledge, information and belief, the following facts:

(a) The character of the charge, mortgage, ground rent, or decree, or defect in title;

(b) The term, number, date of record and proper volume and page of record of said charge, mortgage, ground rent, or decree, or the place or places of record where the defect in title appears;

(c) The names of the real owners of the land affected or intended to be charged, liened or encumbered there by, or of any one having an apparent interest therein, together with the addresses of such person or persons to the extent that such addresses are known to the plaintiff or may have been ascertainable upon reasonable inquiry, and all such persons shall be named parties defendant or respondent to the action;

(d) The location and a short description of the real property affected, charged or intended to be charged with the payment of a particular charge, mortgage, ground rent, decree, or defect in title;

(e) Names of the debtors, obligors and guarantors and any other persons directly or indirectly liable to the plaintiff for the payment of said charge, mortgage, ground rent, or decree, who shall also be named as parties defendant to the action;

(f) An averment that plaintiff does not know, and after reasonable inquiry has been unable to ascertain, the residence or business addresses of the other parties defendant;

(g) A demand for payment or for compliance with the terms of any charge, mortgage, ground rent, decree, or right arising out of such defect in title;

(h) All such other facts as may be pertinent or necessary under existing law.

Section 5. The owner of any land encumbered by such charges, mortgages, ground rents, or decrees, or subject to such defects in title, may institute a proceeding as provided by existing law against any person or persons having such an apparent charge, lien or encumbrance, or apparent title, or interest in or against land, to compel such person or persons to enforce such claim or to perfect such title.

Section 6. No decree or judgment of any court resulting from any proceeding under this act shall be valid or enforceable unless and until a transcript of such judgment or decree shall be filed in the office of the recorder of deeds of the county in which land affected thereby is located and properly indexed against the owners of record named defendants or respondents in the original action or complaint or added thereto in the proceeding, and such transcript shall be filed in the miscellaneous index or a special index provided therefore.

Section 7. All acts and parts of acts inconsistent with the provisions of this act are hereby repealed.

Section 8. The provisions of this act are severable and if any of its provisions shall be held unconstitutional the decision of the court shall not affect or impair any of the re –

maining provisions of-this act; it is hereby declared to be the legislative intent that this act would have been adopted had such unconstitutional provisions not been included herein.

APPROVED The 23d day of May, A. D. 1949.
JAMES H. DUFF

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